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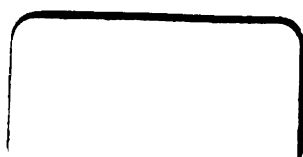
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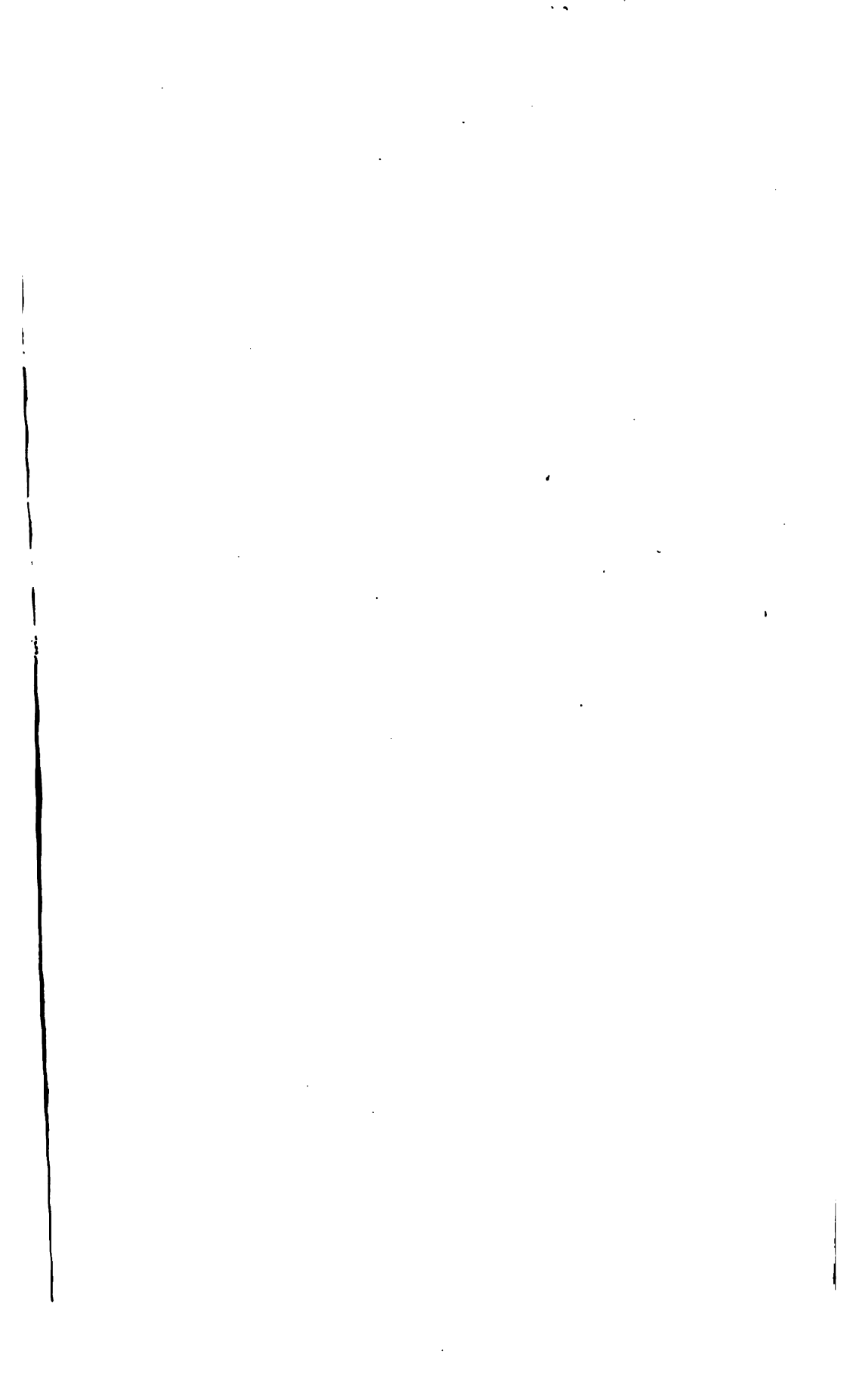
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THE
PRACTICE
IN
CIVIL ACTIONS AND PROCEEDINGS AT LAW,
IN OHIO,
AND
PRECEDENTS IN PLEADING,
WITH PRACTICAL NOTES;
TOGETHER WITH
THE FORMS OF PROCESS,
AND
CLERKS' ENTRIES.

BY JOSEPH R. SWAN,
LATE PRESIDENT OF THE TWELFTH JUDICIAL CIRCUIT.

IN TWO VOLUMES.
VOL. II.

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 Payment of money into Court.

SEC. I. DEFENDANT'S PROCEEDINGS GENERALLY, WHEN THE CAUSE OF ACTION IS ADMITTED.

If the defendant have no available defence to the action, he will suffer judgment to be taken against him by default.

Or, instead of suffering a default, the defendant may voluntarily confess the action, by giving a cognovit, either of part or the whole cause of action.

Or, if the action be upon a bond, bill, note or specialty, for the payment of a sum certain, the defendant may pay into court the amount due, with interest and costs, and have judgment for his discharge.

Or, if the action be not upon a bond, bill, &c., the defendant may pay into court the sum he believes to be due, and costs, and let the plaintiff proceed at his peril, for any further amount which he may claim.

Or, if the defendant dispute neither the cause of action, nor the amount of debt or damages claimed, he may move the court to stay the proceedings on payment of the amount claimed and costs.

SEC. II. PAYMENT OF MONEY INTO COURT.

1. *In what actions.* The statute provides,^a that "if, at any time pending an action on any bond, bill, note or specialty, for the payment of a sum certain, the defendant shall bring into court where the action shall be pending, the principal and interest due on such bill, bond, note, or specialty, and all such costs as have accrued in any suit or suits in law or equity, upon the said bond, the said money so brought in, shall be deemed and taken to be in full payment and satisfaction of such bond; and the court shall give judgment to discharge the defendant accordingly.

"And if, in any other pending suit, the defendant shall bring into court, and deposit with the clerk, for the use of the plaintiff, the amount that he admits to be due, together with all costs that have then accrued, and the plaintiff shall refuse to accept the same in discharge of his suit, and shall not afterwards recover a larger sum than the sum so brought into court, exclusive of costs, he shall pay all costs that may accrue from and after the time such money was so brought in and deposited as aforesaid."

Such is the language of our statute, which seems to include all actions. The common law and the English statutes do not permit money to be thus paid, in actions for assault and battery, false imprisonment, libel, slander, &c.^b

(a) Swan's Stat. 660, §61.

(b) 2 Arch. Prac. 200. 3 and 4 Wen. iv. c. 42, §21.

Payment of money into Court.

2. *Paying money on particular counts or breaches.* In England it is held that where one of the counts of the declaration is for a mere money demand, the amount of which can be ascertained by mere computation, the defendant may pay money into court on that count.^a So, in covenant, if several breaches are assigned, and one for the non-payment of money, the defendant may pay money into court on that breach.^b

No reason is perceived why this may not be done here; and that, as in England, the defendant may, in such case, plead to the other counts and breaches. It is, however, held, that the defendant cannot demur to the other counts or breaches.^c

3. *When to pay money in.* It can be paid into court as a matter of course before plea pleaded, or afterwards; but if after plea pleaded, the pleadings may be such as to need amendment, and leave for that purpose may be necessary from the court.

4. *How paid in, &c.* Pay the money to the clerk, who will give you a receipt for it. Be careful to pay sufficient to cover interest and costs, up to the time of payment. If the whole demand of the plaintiff be not paid, give the defendant or his attorney notice of the payment, thus:

C. D.,
ats. } Franklin Com. Pleas.
A. B. }

Please to take notice, that this day the said C. D. paid into court in this cause and deposited with the clerk, the sum of *two hundred* dollars, the amount admitted due, and also ——— dollars, the costs that have accrued. Please inform me whether you claim a larger sum, or will accept the above in full satisfaction.

Yours, &c.,

E. F., Attorney for Defendant.

Nov. 7, 1859.

To G. H., Attorney for Plaintiff.

5. *Payment on plea of tender.* When tender before suit brought is pleaded, the money must be paid into the hands of the clerk of the court at the time the plea of tender is pleaded, and notice of the payment given at the time the plea is filed. This notice, may perhaps be filed with the plea, but it is safest to give it to the opposite party or his attorney. If the money is not paid in when the plea is filed, the opposite party may treat the plea as a nullity, and proceed to judgment.^d But if the money be not paid in, and the plaintiff take issue on the plea, he will be deemed to have waived the irregularity.^e

(a) 1 Arch. Prac. 200.

(b) 2 W. Bl. Rep. 837; 2 Burr. 1120.

(c) 1 Sellen's Prac. 296; 1 Tidd's Prac. 621.

(d) 2 Hill's N. Y. Rep. 540; Tidd's Prac. 506; 1 Arch. 137; 2 id. 101.

(e) Id. ib.

 Payment of money into Court.

6. *Effect of paying money into court, and proceedings thereafter.* After payment of money into court, the defendant cannot take it out, although he have a verdict,^a or it be paid by mistake;^b and the plaintiff has a right to receive it, whether he confess or deny the tender in his replication.^c

By paying money into court, the defendant, impliedly, acknowledges that the contract or other cause of action is as described in the declaration;^d and the only remaining question is the amount of damages; that is, when the money is paid on the whole of a special declaration, or on the special counts; for, by paying money into court on a common indebitatus count, the defendant, in general, admits no more than that the sum paid in is due to the plaintiff. And paying money into court, on several common counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only. It is, however, even in cases of common counts, a conclusive admission of the plaintiff's right to sue, and his right to the character in which he sues, and that no other person need to have been joined as plaintiff.^e

But paying money into court is no admission of the plaintiff's right of action beyond the sum paid.^f

Payment of money into court on a guarantee, admits an agreement signed according to the statute of frauds;^g if paid on a contract for work and labor, it is a formal admission of the defendant that so much is due on the contract, like an admission by payment before suit brought.^h When there is an entire indivisible contract, to which the payment must be referred, such payment operates as an admission of that contract, leaving it open to the defendant to make out his defence as to the unsatisfied part of it.ⁱ In an action for goods sold and delivered, it admits a contract, though the goods were tortiously converted by the defendant.^j And in an action for goods, sold by sample, at a stipulated price, it precludes the defendant, it seems, from insisting on the inferiority of the goods: he should have returned the goods, and by paying the money into court, admits the contract.^k

If the declaration contain a legal and an illegal demand, the money paid in, and, consequently, the admission, will be applied to the legal demand only.^l

From the terms of the statute before mentioned,^m it would seem that the jury pass upon the whole case where money is paid in, and the plaintiff still prosecutes his suit to recover a sum beyond the amount paid in; for, the statute

(a) 2 Strange, 1027.

(b) 2 Bos. & Pull. 392; 2 T. R. 645.

(c) 1 Bos. & Pull. 333.

(d) 5 Burr. 2640; 1 Esp. 347; 7 Johns. Rep. 315.

(e) Id. ib.

(f) 2 Wend. 431; 2 Campb. 341; 2 Esp. 482; 1 Taunt. 419.

(g) Peake, 15.

(h) 24 Eng. C. L. Rep. 140.

(i) Id. ib.

(j) 2 Bos. & Pull. 550.

(k) 3 Eng. C. L. Rep. 266.

(l) 1 T. R. 464; 1 Bos. & Pull. 264. As to allowing the defendant to show fraud, see 3 Bos. & Pull. 556; 2 M. & S. 106; 9 East. 325; 7 Johns. Rep. 315.

(m) See ante, p. 608.

Payment of money into Court.

provides, that "if the plaintiff shall not recover a larger sum than the sum so brought into court, he shall pay all costs," &c. The jury must, therefore, find a verdict in such case upon the whole cause of action, as in other cases; and if the verdict is for less, or no more than the amount paid in, the judgment on the verdict will be entered against the plaintiff for costs, thus:

FORM OF VERDICT AND JUDGMENT WHEN MONEY HAS BEEN PAID INTO COURT.

After entering the Verdict in the usual form, proceed as follows:

And the defendant having paid into court in this cause, on the — day of —, A. D. —, the sum of — dollars, and also the costs which had then accrued herein, and the recovery and verdict aforesaid not being larger than the sum so paid, exclusive of the said taxed costs: Therefore, it is considered that the plaintiff take the money so paid in, and the defendant go hence discharged in the premises, and that the defendant recover of the plaintiff the costs herein made after said money was brought into court, taxed at — dollars — cents.

Where the Plaintiff recovers more than is paid in, the verdict and judgment may be entered in the usual form, and then proceed as follows:

And on motion of the plaintiff it is ordered that he take the money paid in court by the defendant, and that the same be credited and indorsed upon the executions which may be issued upon the above judgment.

The forms of verdicts and judgments, where an issue is taken on the amount paid in, and in cases of tender, will be given under the head of Forms of Verdicts and Judgments in Assumpsit.

The defendant may, however, if he prefer it, pay the money in, give the notice, and plead the payment in bar of the further maintenance of the action;^a and to this the plaintiff may reply, that he accepts the money in full satisfaction, or that he claims a further sum.^b

When these pleas are filed, the verdict and judgment will be entered on the pleadings, in the form hereafter given.^c

SEC. III. DEFENDANT'S PROCEEDINGS GENERALLY, PREPARATORY TO A DEFENCE.

In England and in New York, the following motions may be made by the defendant before he pleads: 1st. To strike out of the declaration unnecessary counts or superfluous matters contained in a single count; 2d. To consolidate actions where two or more actions are brought by the same plaintiff against the

(a) See form of the plea, No. 63, post, forms of Pleas, &c., in Assumpsit, Chap. 5.

(b) See form of Replication, No. 64, 65, post, forms of Pleas in Assumpsit, Chap. 5.

(c) See forms of Verdicts and Judgments in Assumpsit, post.

Striking out Counts — Oyer.

same defendant at the same time, for causes of action which might have been joined; 3d. To set aside proceedings for irregularity; 4th. He may demand a bill of particulars, &c.; and 5th. Obtain oyer in certain actions.

In this State, the trial term follows immediately after the filing of the declaration, and, in general, no term of the court intervenes between the time of the filing of the declaration, and the time required for pleading.

How far a party may be authorized in our practice to decline to plead because at the trial term he intends to make a motion to strike out counts, &c., or what the consequences would be if the motion were overruled, is not settled by our practice. If such a motion were made at the trial term merely for delay, and overruled, the court would probably put the defendant to an affidavit of a meritorious defence, &c., before setting aside the default.

SEC. IV. STRIKING OUT COUNTS.

If the declaration contain any unnecessary and superfluous counts, or if any part of a single count be superfluous, the defendant may move the court, at any time before issue joined, to have such parts or counts stricken out.^a

SEC. V. OYER.

1. *In what cases demandable.* Oyer can be demanded only where profert is made.^b

If a deed be pleaded without profert, the other party should demur specially for the want of profert, particularly if it be essential to his plea or replication, that the deed should be set forth.^c

On the other hand, if profert be unnecessarily made, this does not entitle to oyer.^d

Oyer is generally craved where it is essentially necessary that the deed, &c., pleaded, should be set forth before the party craving oyer can plead.

Bonds, and other specialties, letters of administration, and policies of insurance, are proper subjects of oyer.^e It may, in this State, be craved of the process in the action,^f and of the transcript of the justice by which the action came into court,^g but not of the mesne process issued below by the justice.^h

2. *At what time demandable.* By the English practice, oyer must be demanded before the time for pleading has expired. If made afterwards, it may be treated as a nullity, and the other party may proceed to take judgment. It cannot, by the English practice, be demanded after a plea in abatement. These

(a) Stat. 671, §96.

(b) As to case in which profert must be made, see ante, Vol. 1, 350, note (h).

(c) 1 Saund. 8; 2 Arch. Prac. 194.

(d) Steph. Pl. 4 Am. Ed. 68.

(e) 2 Wils. 413.

(f) 10 Ohio Rep. 265.

(g) 6 Ohio Rep. 388.

(h) Id. ib.

Oyer.

rules, however, have no very practical application in this State, as adverse parties may require copies of all instruments of writing, which the other intends to offer in evidence at the trial.^a

3. *How demanded.* It is usual, as has already been remarked,^b where profert of an instrument is made, to file a copy with the declaration. Our statute^c seems to contemplate that the party who desires oyer, shall require it of the opposite party. It may be demanded by a notice in writing, in the usual manner.^d In practice, it is commonly made by a mere verbal request.

A defendant who prays oyer of a deed, is entitled to a copy of the attestation, the names of the witnesses and the acknowledgment, as well as every other part of the deed;^e but demand of oyer of a bond will not entitle the party to oyer of the condition, and vice versa; but he must demand oyer of both, if he wants it.^f

4. *At what time granted.* No particular time is limited for a plaintiff to give the defendant oyer. But it is for the interest of the plaintiff to grant it without delay; for the defendant will be entitled to as many pleading days after the oyer has been given, as he had, unexpired, at the time of demanding it.

If the plaintiff demand oyer, the defendant has, by the English practice, two days, exclusive, after it is demanded, to give it;^g and if not given within that time, the plaintiff may treat the plea as a nullity; and such is, probably, the rule in this State. If the demand of oyer made by the plaintiff be complied with, he has the same time to reply, after oyer given him by the defendant, as he had at the time of demanding it.

5. *How granted.* As soon as oyer is asked, make out a copy of the instrument and deliver it to the opposite attorney.

6. *Proceedings on refusal of Oyer.* If oyer be refused when it ought to be granted, the party insisting upon it must enter his prayer upon the record or journal of the court, which may be as follows:

A. B. }
v. } In Debt.
C. D. }

The said [plaintiff or defendant,] by M. S., his attorney, craves oyer of the said [indenture or writing obligatory, and the condition of the said writing, obligatory, or deed, as the case may be,] in the [declaration or plea,] of the said [plaintiff or defendant,] alleged.

(a) Stat. 670, §93, 94.

(b) Ante, p. 351, n.

(c) Stat. 670, §93.

(d) Tidd. 2 Am. Ed. 636, 637; 4 Wend.

214; 1 Burr. Prac. 429.

(e) Tidd, 2d Am. Ed. 585.

(f) Comyn's Dig. Pleader, p. 1; Burrill's Prac. 429.

(g) 2 T. R. 40.

Oyer — Consolidating Actions.

This being in the nature of a plea, the other party may either counterplead or demur to it, and the court will thereupon give judgment; upon which judgment a writ of error may be brought.^a

7. *Proceedings in case of Variance.* If the plaintiff has not set out the instrument correctly according to its true construction, the defendant should either plead non est factum generally, in which case he may object to the instrument on account of variance; or, on oyer, set forth the whole instrument and demur, and thereby raise the question of the sufficiency of the whole declaration. But by spreading the instrument upon the record, he makes it a part of the declaration, and thus, in general, upon the plea of non est factum, cures the defects in setting it forth, and, consequently, cannot in such case object that there is a variance.^b Be careful, therefore, to omit oyer upon plea of non est factum, if you wish to make a question of variance.

A small variance between the oyer of an instrument and the declaration, is not regarded.^c

8. *Proceedings after Oyer granted.* After oyer is granted, it is optional with the party whether he set it forth in his plea or not.^d If he undertake to set forth the whole deed, so far as it relates to the matter of the action, or if he misrecites it, the other party may either treat the plea as a nullity and take judgment,^e or, he may pray that the deed be enrolled, and thereupon have it truly enrolled and demur.^f The deed is enrolled by the party praying at the commencement of his demurrer that it be enrolled; averring that it is done in the words and figures following; and then setting it forth.

If correct oyer has once been given, and the plaintiff afterwards amend his declaration, he need not serve new oyer with the amended declaration.^g

SEC. VI. CONSOLIDATING ACTIONS.

The statute provides that the defendant, before issue joined, may move the court to consolidate unnecessary actions.^h

It is for the interest of the holder of negotiable paper to sue jointly the makers and indorsers; otherwise, costs will be recovered in but one of the actions.ⁱ And in such case, when separate suits are brought against the makers and indorsers, the court, on motion, will no doubt consolidate the actions.

The proper time, perhaps, to make a motion to consolidate actions, would be at the appearance term: the indorsement on the writ showing for what cause the action is brought.

(a) 2 Salk. 498; 2 Ld. Raym. 969, 970; 2 Str. 1186; 1 Wils. 16.

(b) 12 Pick. 531; 6 Johns. 410; 14 Johns. 401; 10 Eng. C. L. Rep. 453; 6 Wend. 629; 19 Johns. 49; 6 Cowen, 360; 5 Taunt. 707.

(c) 6 Cowen, 360.

(d) 2 Str. 1241.

(e) 4 T. R. 370.

(f) Com. Dig. Pleader, p. 1.

(g) 1 Johns. Cas. 415.

(h) Swan's Stat. 671, §96.

(i) 42 vol. Stat. 72.

SEC. VII. SETTING ASIDE PROCEEDINGS FOR IRREGULARITY.

If there has been any irregularity in the plaintiff's proceedings,—as if the declaration be entitled and filed before the mesne process in the action issued—the defendant may move the court to set aside the proceedings.

SEC. VIII. BILL OF PARTICULARS AND COPIES.

1. *In what actions bill of particulars may be demanded.* The statute provides that the plaintiff or his attorney, if required, shall deliver to the defendant or his attorney, a copy of the account or bill of particulars of the demand whereon the declaration is founded, or which he intends to offer in evidence at the trial.

A bill of particulars is most frequently called for in actions of assumpsit for work and labor, goods sold and delivered, and the like.

It will be observed, that the language of the statute may be construed in a somewhat restricted sense, so as to make it applicable only to copies of mere instruments of evidence.^b

It has, however, been generally construed and acted upon in practice as entitling a party to a bill of particulars of the subject matter of the claim.

It is held in England that in assumpsit for non-performance of a contract for the sale of a horse, with common counts, to recover back the deposit, the plaintiff having in his first count alleged that the defendant, who was to make a good title, had delivered an abstract which was insufficient, defective and objectionable; “the court of common pleas, on application for an order, obliged the plaintiff to give a particular of all objections to the abstract arising upon matters of fact.” And where the vender brings an action to recover back a deposit, because the condition of the sale has not been complied with, the defendant may have a particular of the grounds on which the plaintiff seeks to re-

(a) Swan's Stat. 670, §93.

(b) The sections of the statute are as follows:

“Sec. 93. The plaintiff or his attorney, if required, shall deliver to the defendant or his attorney, a copy of the account or bill of particulars of the demand, or a copy of the bill, bond, deed, bargain, contract, note, instrument or other writing, whereon the declaration is founded, or which he intends to offer in evidence at the trial.

“Sec. 94. The defendant or his attorney, if required, shall deliver to the plaintiff or his attorney, a copy of any deed or instrument of writing, of which in his plea he shall make profert; or, a copy of any bill, bond, deed, note, receipt, bargain, contract, instrument of writing or bill

of particulars, of any account or demand which he intends to offer in evidence at the trial of the cause. And if the plaintiff or defendant shall refuse to furnish the copy or copies required agreeably to the provisions of this section, or the preceding section, the party so refusing shall not be permitted to give in evidence at the trial the original, of which a copy has been refused as aforesaid.”

These sections might perhaps be held, and without much difficulty, as relating to copies of accounts, and writings, the originals of which the parties intended to offer in evidence. Such, however, has not been the construction in practice.

(c) 3 Bos. & Pull. 246.

Bill of Particulars and copies.

cover.^a So, in actions of debt or bond, conditioned for the performance of covenants or to indemnify, the defendant may call for a particular of the breaches for which the action is brought.^b And where a general form of declaring is given by statute, it seems that the plaintiff may be required to give an account of the particulars of his demand, in order to enable the defendant to prepare for his defence.^c

In actions *ex delicto*, the injury is, in general, fully stated; but common law courts have required plaintiffs to give the defendant a bill of particulars in trover,^d and escape.^e But there must be some special grounds for asking it.^f For, if the cause of action is set forth in the declaration so as to fully disclose the nature of the plaintiff's demand, the court will refuse to compel a delivery of particulars.^g

2. *Notice to the plaintiff to furnish a bill of particulars and copies of instruments.* The notice may be in the form following:

Clark Com. Pleas.

C. D. }
ats. } In [*Assumpsit.*]
A. B. }

To C. D., or his attorney.

You will please furnish me with a copy of the account or bill of particulars of your demand in the above suit, and copies of the notes, bills, bonds, deeds, instruments or other writings upon which the declaration in the above suit is founded, or which you intend to offer in evidence on the trial.

I am, respectfully,

Date, &c.

C. D.

3. *Form of bill of particulars, &c.*

Clark Com. Pleas.

A. B. }
v. } In [*Assumpsit.*]
C. D. }

This action is brought to recover the balance of the following account: [*Here set out the items of the account, giving the defendant credit for such sums as are not disputed; or say:* This action is brought to recover the face of a bill of exchange, with interest, of which the following is a copy:]

And instruments of writing, of which the following are copies, will be offered in evidence on the trial of the above cause: [*Here give copies.*]

(a) 1 Campb. 293.

(b) 1 Tidd, 597.

(c) *Id.* ib.

(d) 4 Cowen, 54.

(e) 16 Eng. C. L. Rep. 321.

(f) 10 Mees. & Welb. 676.

(g) 32 Eng. C. L. Rep. 141.

Requisites of Bill of Particulars and copies.

The above are the particulars of the plaintiff's demand in the above action, and copies of the instruments of writing which he intends to offer in evidence on the trial ; and he relies on all the counts in the declaration for the recovery of his above demands.

4. *Requisites of bill of particulars and copies.* The copies of instruments must be substantially correct, and if so erroneous as in the opinion of the court to mislead the opposite party, the original will be rejected as if no copy had been served. In such case, if, in consequence of ruling out the original by reason of the copy being erroneous, a verdict is found against the party who served the copy, the court, at his costs, will set aside the verdict and grant a new trial.

The bill must be drawn with such particularity, as to inform the opposite party of the foundation of the transaction, upon which the claim arises ; and it will be sufficiently certain and definite, if it apprises the party for whose benefit it is given, of the evidence which is to be offered, so that there can be no mistake as to the preparation to be made to resist the claim.* Such errors in the date or amount of an item, &c., as will not mislead the opposite party, will not, therefore, exclude the item from being proved, and if just, allowed. As where the plaintiff's bill contained, among other things, the following items :

To cash paid Froggart & Co. -----	£80	13s.	6d.
To ditto paid Hoffman & Co. -----	93	8	0
To ditto ditto -----	80	13	6

Evidence being given of the first sum of £80 13s. 6d. to *Froggart & Co.*, the plaintiff was proceeding to show, that a second sum of £80 13s. 6d. had likewise been paid to *Froggart & Co.*, by the plaintiff, at the defendant's request ; when it was objected that there was no mention made, in the bill of particulars, of more than one sum being paid to *Froggart & Co.*, and that, therefore, the plaintiff could not give it in evidence. The plaintiff offered to show that this was a clerical error, as the above item, "To ditto paid Hoffman & Co.," had been inserted, by mistake, between the other two items, and that the last item, "To ditto ditto," &c., must therefore, have been understood to refer to *Froggart & Co.* Upon this, the Judge overruled the objection, and received the evidence of the second payment, and said, that if the defendant could show by affidavit, that he had been misled by the plaintiff's particular, as to the second payment to *Froggart & Co.*, the court would reject the evidence as to that sum.^b So, where the work for which the action was brought, was stated in the particulars, to have been done in the wrong month, the plaintiff was permitted to give evidence of the work having been done in another month.^c

These cases are founded upon the rule, that a mistake in the statement of an item, or demand, is of no consequence, if it will not mislead or take the oppo-

(a) 5 Wend. Rep. 48.

(b) 1 Camp. 60, note.

(c) 2 Taunt. 224.

Effect of not furnishing particulars, &c.—When and how plea filed.

site party by surprise. If, however, an item due the party filing the bill, is by mistake omitted, he cannot be permitted to prove the item; nor can it be allowed to him. If the plaintiff, ignorant of the nature and extent of his demand, has given an imperfect particular of it, he shall, nevertheless, be restricted in his own evidence, and shall not be allowed directly to seek to recover any thing out of, or beyond the contents of the particular. But if the defendant, in attempting to defeat this restricted claim, give him a better case than he was at liberty to make for himself, he is entitled to a judgment for all that is proved by the defendant to be due to him, not exceeding, however, the original amount claimed by the plaintiff.^a

^a Where the defendant offers evidence of a claim against the plaintiff, the latter may prove a payment of such claim, although such payment does not appear in his bill of particulars; for it was not a proper item to make out the case of the plaintiff, in the first instance, but to rebut evidence produced by the defendant.^b

5. *Effect of not furnishing bill of particulars or copies.* The court will not permit the party of whom a bill of particulars or copies have been demanded, to give in evidence the original account, demand, or instrument, a copy &c. of which he has neglected to furnish to the opposite party.^c And when the nature of the declaration or cause is such that the defendant cannot make out his plea without knowing the particulars of the plaintiff's demand, or a copy of the instruments he intends to offer in evidence, and the plaintiff has notice of that fact, the court will not permit the default of the defendant in pleading to prejudice him, if caused by the delay of the plaintiff in furnishing the bill of particulars, or copies of instruments.

SEC. IX. WHEN AND HOW PLEAS FILED.

The time allowed for filing pleas is regulated by the rules of each circuit.

It is not necessary to serve copies of pleadings upon the adversary counsel or his client, as parties are bound by statute^d to take notice of the pleadings filed in the clerk's office; and each party may obtain a copy from the clerk of the court of the pleadings of his adversary; the expense of which is taxed in the bill of costs.^e The pleadings are placed in the hands of the clerk or his deputy at the clerk's office, who indorses the day when filed, thus: "Filed May 13, 1850," C—— C——, clerk. A paper not thus indorsed, but placed in the office, and either strung upon a thread or laid in a drawer or pigeon hole, is, it seems, considered as filed.^f

(a) 1 Camp. 68.

(b) 2 Wend. 593.

(c) Swan's Stat. 670, §94.

(d) Stat. 670, §95.

(e) See the rule, ante, p. 8, Rule 15.

(f) Haines v. Lindsey, 4 O. R. 88.

CHAPTER II.

DEMURRERS.

- SECTION I. GENERAL DEMURRER TO A DECLARATION OR REPLICATION.**
- II. GENERAL AND SPECIAL DEMURRER TO A DECLARATION OR REPLICATION.**
- III. DEMURRER TO PART OF A DECLARATION.**
- IV. DEMURRER TO A PLEA OR REJOINDER.**
- V. JOINDER IN DEMURRER.**
- VI. FORMS OF SPECIAL CAUSES OF DEMURRER TO DECLARATIONS; AND HEREIN,**
1. That the declaration is entitled before the day on which the promises and causes of actions are laid to have been made and occurred.
 2. That no time is stated in a material allegation in the declaration.
 3. That the day on which the promise is laid is inconsistent with that on which another material fact is stated to have occurred.
 4. For misjoinder of forms of action.
 5. For misjoinder of rights or causes of action.
 6. That a count is double.
 7. That a count contains repugnant promises.
 8. That the count lays the causes of action in the alternative.
 9. That the declaration wants certainty in stating the goods, &c.
 10. For not making profert of a deed, or letters testamentary, or letters of administration.
 11. To a declaration against the drawer or indorser of a bill — that presentment for payment to the acceptor and notice of dishonor, are not stated.
 12. That the amount of damages is not stated in the declaration.
- VII. FORMS OF SPECIAL CAUSES OF DEMURRER TO PLEAS; AND HEREIN,**
1. That the plea professes in the commencement to answer the whole declaration, but contains in the body thereof an answer as to part only.

2. That the plea improperly concludes to the country, instead of concluding with a verification ; or vice versa.
3. For duplicity in alleging that there was no consideration for the acceptance or indorsement, and also relying on fraud, &c.
4. That the plea is hypothetical or in the alternative, and does not confess or traverse.
5. That the plea is argumentative.
6. That the matter is pleaded by way of recital or rehearsal, and not positively.
7. That the plea is repugnant.
8. That the plea contains a negative pregnant.
9. That the plea traverses more than is alleged in the declaration, and is too extensive.
10. That the traverse in the plea should have been in the disjunctive.
11. That a plea to a declaration in trover amounts to the general issue, as it sets up title and possession in the defendant without giving the plaintiff color.

VIII. CAUSES OF DEMURRER TO A REPLICATION, THAT IT IS DOUBLE AND MULTIFARIOUS.

IX. CAUSES OF DEMURRER TO A REJOINDER THAT IT IS A DEPARTURE, &c.

SEC. I. GENERAL DEMURRER TO A DECLARATION OR REPLICATION.

C. D. }
ats. } ——— Common Pleas, — (a) Term, A. D.
A. B. }

The said defendant, by J. S., his attorney, [or in his own proper person,] says that the said declaration [or replication] is not sufficient (b) in law.

J. S., Attorney for Defendant.

(a) The term in which the pleading demurred to is filed. But it is unnecessary to entitle the plea of any term.

(b) These forms of Demurrers and Joinder in Demurrer, are taken from the forms recently prescribed by the English Judges. Indeed, by the common law, there is no particular form actually essential to a demurrer; and, therefore, where a pleading, beginning and ending in abatement, and otherwise partaking very little of the usual form of a demurrer, was, nevertheless, meant to be,

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General Demurrer to Declaration and Replication.

SEC. II. GENERAL AND SPECIAL DEMURRER TO A DECLARATION OR REPLICATION. (a)

C. D. }
 ats. }
 A. B. }

The said defendant by — his attorney [or in his own proper person,] says that the said declaration [or replication,] is not sufficient in law. [If the de-

and in substance was, a demurrer, it was holden good. 5. Mod. 131; 2 Saund. 129, n. 6; Arch. Pl. & Ev. 345.

The old forms are as follows:

1. Demurrer to Declaration.

— Com. Pleas.

C. D. }
 ats. }
 A. B. }

And the said C. D., defendant in this suit, by G. H., his attorney, comes and defends the wrong [or, "force"] and injury when, &c., and says, that the said declaration, [or, "the said first [or other] count of the said declaration,"] and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof, against the said defendant; and that he, the said defendant, is not bound by law to answer the same. And this he is ready to verify; wherefore, for want of a sufficient declaration [or, "count of the said declaration,"] in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him, &c.

And the said defendant, according to the form of the statute in such case made and provided, states and shows to the court here, the following causes of demurrer to the said declaration, [or, "to the said count of the said declaration,"] that is to say: [here state the particular causes of demurrer:] And also, for that the said declaration is in other respects, uncertain, informal, and insufficient, &c.

G. H., Att'y for Def't.

2. Demurrer to Plea in Abatement.

— Com. Pleas.

A. B. }
 v. }
 C. D. }

And the said plaintiff saith, that the said plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to quash the said writ and declaration, and that he, the said plaintiff, is not bound by the law of the land to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient plea in this behalf, the said plaintiff prays judgment, and that the said defendant may answer further to the said declaration, &c.

And the said plaintiff according to the form of the statute in such case made and provided, states and shows to the court here, the following causes of demurrer to the said plea, that is to say: [For that the said C. D., by his plea aforesaid, hath admitted himself to be the person named the defendant in and by the aforesaid writ and declaration of him, the said plaintiff:] And also for that the said plea is in other respects informal and insufficient.

E. F., Plaintiff's attorney.

(a) See post, p. 625.

General and Special Demurrer.

murrer be special, add the cause of demurrer thus:] and the defendant shows to the court the following causes of demurrer to the said declaration, [*or replication,*] that is to say: [*showing the ground of the demurrer. Sign the demurrer.*]

3. Demurrer to a Replication to a Plea in Abatement.

— *Com. Pleas.*

C. D. }
ads. }
A. B. }

And the said defendant saith, that the said replication of the said plaintiff, to the said plea of him, the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to maintain the aforesaid bill, [*or, "writ," or, "declaration,"*] of the said plaintiff; and that he, the said defendant, is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore, for want of a sufficient replication in this behalf, he, the said defendant, as before, prays judgment of the said bill, [*or, "declaration,"*] and that the same may be quashed, &c. [*Proceed to specify causes of demurrer.*]

G. H., Defendant's attorney.

4. Demurrer to plea in Bar.

— *Com. Pleas.*

A. B. }
v. }
C. D. }

And the said plaintiff, as to the said plea of the said defendant, by him, [*secondly*] above pleaded, saith, that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law, to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against him, the said defendant, and that he, the said plaintiff, is not bound by law to answer the same. And this he, the said plaintiff, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, the said plaintiff prays judgment, and his damages by reason of the not performing of the said several promises and undertakings, in the said declaration mentioned, to be adjudged to him, &c. [*If the action be debt, say,—*"prays judgment, and his debt aforesaid, together with his damages by him sustained, on occasion of the detention thereof, to be adjudged to him, &c." *If in covenant, say,—*"prays judgment, and his damages by him sustained, on occasion of the said breach of covenant in the said declaration mentioned, to be adjudged to him, &c." *If in trespass, say,—*"prays judgment, and his damages by him sustained, on occasion of the committing of the said trespasses, [*or in case, "grievances,"*] to be adjudged to him, &c.].

And the said plaintiff, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said [*second*] plea, that is to say; for that, &c., [*here set out the causes of demurrer, according to the case: Thus, for not concluding to the country,—*"For that the said defendant hath not concluded his said plea, by putting himself upon the country, &c." *For pleading nil debet in assumpsit,—*"For that the said defendant hath not, in or by his said plea, confessed and avoided, or traversed and denied, the making of the several promises and undertakings in the said declaration mentioned; and also for that the said plea is inartificially pleaded, and in other respects uncertain, &c.]. And also, that the said second plea is, in other respects, uncertain, informal and insufficient, &c.

E. F., Plaintiff's attorney.

Demurrer to part of a Declaration.

SEC. III. DEMURRER TO PART OF A DECLARATION.

C. D., }
 ats. } ——— Com. Pleas, ——— Term, A. D. ———.
 A. B. }

The said defendant, by ———, his attorney, [*or*, in his own proper person,] as to the first count of said declaration [*or*, as “to the said trespasses so far as they

5. Demurrer to a Replication.

——— Com. Pleas.

C. D. }
 ats. }
 A. B. }

And the said defendant saith, that the said replication of the said plaintiff, to the said [second] plea of him, the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against him, the said defendant; and that he, the said defendant, is not bound by law to answer the same, and this he, the said defendant, is ready to verify; wherefore, for want of a sufficient replication in this behalf, he, the said defendant, prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And the said defendant, according to the form of the statute in such case made and provided, states and shows to the court here, the following causes of demurrer in law to the said replication, that is to say: [*Here state the causes, and conclude thus:*] And also for that the said replication is, in other respects, uncertain, informal and insufficient, &c.

G. H., Attorney for defendant.

6. Demurrer to a Rejoinder.

——— Com. Pleas.

A. B. }
 v. }
 C. D. }

[*The form of this demurrer resembles the demurrer to the plea, substituting, “rejoinder” for “plea,” throughout.*]

JOINDERS IN DEMURRER.

7. Joinder in Demurrer to a Declaration or Replication.

——— Com. Pleas.

A. B. }
 v. }
 C. D. }

And the said plaintiff saith, that the said declaration [*or*, “first count of the said declaration,” *or*, “replication,”] and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against the said defendant, and the said plaintiff is ready to verify and prove the same, as the court here shall direct and award: wherefore, inasmuch as the said defendant hath not answered the said declaration, [*or*, “first count,” *or*, “replication,”] nor hitherto in any manner denied the same, the said plaintiff prays judgment, and his damages by reason of the not perform-

Demurrer to part of a Declaration.

relate," &c.] says that the same is not sufficient in law. [*See the observations on the last form.*]

ing of the said several promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

E. F., Att'y for Pl'ff.

In *Debt*, the joinder concludes thus,—“prays judgment and his debt aforesaid, together with his damages by him sustained, on occasion of the detention thereof, to be adjudged to him,” &c. In *Covenant*, thus,—“prays judgment and his damages by him sustained on occasion of the said breach of covenant in the said declaration mentioned to be adjudged to him,” &c. In *Trespass*, thus,—“prays judgment and his damages by him sustained on occasion of the committing of the said trespasses, to be adjudged to him,” &c. In *Case*, thus,—“prays judgment and his damages by him sustained on occasion of the committing of the said grievances to be adjudged to him,” &c.

8. Joinder in Demurrer to Plea in Abatement.

Com. Pleas.

C. D. }
ads. }
A. B. }

And the said defendant saith, that the said plea of the said defendant, and the matters therein contained, are sufficient in law to quash the said writ and declaration, and which said plea and the matters therein contained, the said defendant is ready to verify and prove as the court here shall direct, &c.; wherefore, inasmuch as the said plaintiff hath not denied, nor in any manner answered the said plea, the said defendant, as before, prays judgment of the said writ and declaration, and that the same may be quashed, &c.

G. H., Att'y for Def't.

9. Joinder in Demurrer to Plea in Bar.

(*In assumpsit, debt, covenant, trespass or case.*)

Com. Pleas.

C. D. }
ads. }
A. B. }

And the said defendant saith, that his said plea by him [secondly] above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action thereof against him, the said defendant; and the said defendant is ready to verify and prove the same when, where and in such manner as the court here shall direct and award: wherefore, inasmuch as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him, the said defendant, &c.

G. H., Att'y for Def't.

10. Joinder in Demurrer to a plea in bar in *Replevin*.

Com. Pleas.

A. B. }
v. }
C. D. }

And the said plaintiff saith, that the said plea in bar of him, the said plaintiff, to the said cognizance of the said defendant, and the matters in the said plea in bar contained, are sufficient in law to bar the said defendant, from having a return of the said [goods and chattels], and which

Demurrer to a Plea or Rejoinder.

SEC. IV. DEMURRER TO A PLEA OR REJOINDER.

A. B. }
 v. } ——— Com. Pleas, ——— Term, A. D. ———
 C. D. }

The plaintiff, by ———, his attorney, [*or*, in his own proper person,] saith that the said plea [*or*, rejoinder,] is not sufficient in law. [*If the cause of demurrer be special, add the cause of demurrer thus:* And the plaintiff shows to the court the following cause of demurrer to the said plea [*or*, rejoinder,] that is to say: [*Showing the ground of demurrer. Sign the demurrer.*]

If the demurrer be to one plea only, say: The plaintiff, by ———, his attorney, [*or*, in his own proper person,] as to the said [*first*] plea, saith, that the same is not sufficient in law.

said plea in bar, and the matters therein contained, the said plaintiff is ready to verify and prove as the court here shall direct and award; and because the said defendant hath not answered the said plea in bar, nor in any manner denied the same, the said plaintiff, as before, prays judgment and his damages on occasion of the taking and unjustly detaining of the said [goods and chattels,] to be adjudged to him, &c.

E. F., Att'y for Pl'ff.

11. Joinder in Demurrer to a Replication to a plea in abatement.

——— Com. Pleas.

A. B. }
 v. }
 C. D. }

And the said plaintiff saith, that his said replication to the said plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law for him, the said plaintiff, to maintain his aforesaid bill [*or*, "declaration,"] which said replication, and the matters therein contained, the said plaintiff is ready to verify and prove, as the court here shall direct and award; wherefore, inasmuch as the said defendant hath not answered the said replication, nor hitherto in any manner denied the same, the said plaintiff, as before, prays judgment, &c., and that his bill [*or*, "declaration"] may be adjudged good, and that the said defendant may further answer thereto, &c.

E. F., Att'y for Pl'ff.

(a) A general demurrer excepts to the sufficiency of the declaration or pleading demurred to, in general terms, without showing, specifically, the nature of the objection; a special demurrer adds to this a specification of the particular ground of exception.

A general demurrer is proper, where the defect is matter of *substance*; that is, where the matter set up by the opposite party is, even if true, essentially insufficient.

But if the matter set up by the opposite party is defective in form only; that is, inartificially stated, but enough appears to entitle him to a judgment as far as relates to the merits of the

cause, a special demurrer is necessary to reach the formal defect.

When there is a special demurrer, the party may, on the argument, not only take advantage of the particular faults which his demurrer specifies, but also, of all such defects in substance, as a general demurrer would have reached.

A special demurrer, which sets forth in general terms that the pleading is "uncertain, defective and informal," or the like, and which words are sometimes added at the close of a special demurrer, are always inoperative and useless; inasmuch as upon special demurrer it is necessary to show specifically in what respect the pleading is

Joinder in Demurrer.

SEC. V. JOINDER IN DEMURRER.

A. B. }
 v. } ——— Com. Pleas, ——— Term, A. D. ———
 C. D. }

And the said plaintiff, [or, defendant,] by ———, his attorney, saith, that the said declaration [or, "plea," &c.,] is sufficient in law. [Sign in the usual form: J. S., Att'y for pl'ff, [or, def't.]]

SEC. VI. FORMS OF SPECIAL CAUSES(a) OF DEMURRER TO DECLARATIONS.

uncertain~~ing~~ defective or informal. Steph. Pl. 142.

A demurrer admits all such matters of fact as are sufficiently pleaded.

On demurrer, the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it. See Index, DEMURRER.

(a) As to the distinction between a general and special demurrer, and the practice on demurring, see ante, (a). The statute of Ohio, (Stat. 687, §141) provides that no process, return, pleading, or other proceeding in civil actions, shall be abated, arrested, quashed, or reversed, for mere want of form, but judgment shall be given according to the right and justice of the case, as the matter in law shall appear to the court, without regarding any defects, or want of form in such process, return, pleading, or other proceedings, except such only as the party shall set down and express with his demurrer as the cause thereof."

It is proper to refer here to the English statutes upon the same subject.

The necessity of demurring *specially* for errors in matters of *form*, was created by the statutes 27 Eliz. c. 5, and 4 Ann. c. 16. The latter provides, that "where any demurrer shall be joined and entered in any Court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any *imperfection, omission, or defect* in any writ, return, *plaint, declaration and other pleading, process, or cause of proceedings whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same*, notwithstanding that such imperfection, omission or defect might have heretofore been taken to be matter of substance, and not aided by the statute

of Eliz.; so as sufficient matter appear in the said pleadings upon which the court may give judgment according to the very right of the cause;" and "that no advantage or exception shall be taken of or for an immaterial traverse, see post, 631 note; "or of or for the default of entering pledges upon any bill or declaration," see ante, V. 1. 186, note (o); "or of or for the default of alleging the bringing into court any bond, bill, indenture or other deed whatsoever," see post, 630, note (a), mentioned in the declaration or other pleadings; "or of or for the default of alleging of the bringing into court, letters testamentary, or letters of administration; or of or for the omission of *vi et armis, et contra pacem*, or either of them; or of or for the want of averment of *hoc paratus est verificare, or hoc paratus est verificare per recordum*; or of or for not alleging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions and defects, or any other matter of like nature, except the same shall be specially set down and shown for cause of demurrer; see Bolton v. Bishop of Carlisle, 2 Hen. Bl. 262; Buckley v. Kenyon, 10 East, 139; Bowdell v. Parsons, id. 359; Bach v. Owen, 5 T. R. 409. By Rule Mich. T. 1654, s. 17, see Willes, 220; 1 Saund. 160, note 1, 337 h, note 1, "upon demurrers" (special), "the causes shall be specially assigned, and not involved with general unapplied expressions of 'double,' 'negative pregnant,' 'uncertainty,' 'wanting form,' and the like, but shall show specially wherein, in order that the other party may, as the cause shall require, either join in demurrer, or amend or discontinue his action." This rule is practically applied in this State. Where the defendant is under terms to plead issuably, he cannot demur *specially* to the declaration; 7 T. 530; Tidd, 9th ed. 472.

Forms of Special causes of Demurrer to Declarations.

1. *That the Declaration is entitled before the day on which the Promises and Causes of Action are laid to have been made and accrued.*(a)

That it appears from the declaration that the plaintiff declared in this action before the said supposed promises were made or the said supposed causes of action accrued to him, inasmuch as the writ issued in this cause was issued and is tested and dated on the first day of January, A. D. 1847, and yet it is charged in said declaration that the defendant was indebted to the plaintiff in the moneys therein specified, and promised to pay the same, on the fifth day of January, A. D. 1847.

2. *That no time is stated in a material Allegation in the Declaration.*

That it is not alleged or shown in the said declaration [*or, "— count,"*] on what day or at what time the said defendant was indebted to the plaintiff, or promised him, as therein alleged, or when the said supposed causes of action arose or accrued.(b)

3. *That the day on which the Promise is laid is inconsistent with that on which another material fact is stated to have occurred.*(c)

For that it is averred in the said declaration that the said bill was drawn on the first day of January, A. D. 1848, payable two months after the date thereof, and yet it is afterwards alleged that the defendant on the 1st day of January, A. D. 1846, promised to pay the said sum in the said bill specified.

(a) It seems the above objection would not be sufficient to support a writ of error; 5 Eng. C. L. Rep. 392; 9 Id. 485. And where the record in an action for slander stated that the writ issued on the 4th of June, and that the words were spoken on the 27th, it was held that this discrepancy on the record was no ground for arresting the judgment; *Steward v. Layton*, 3 Dowl. P. C. 430; cited, 1 Chitty, Jr. Prac. 29.

(b) The rule is that every material or traversable fact in any pleading, must be stated to have occurred upon a particular day, showing the month and year, otherwise the defendant may demur; Com. Dig. Pleadings, C. 19; 14 East, 291; Steph. 3d ed. 292, 45. And this rule ap-

plies even in those instances in which the plaintiff is not bound to *prove* that the fact occurred on the day stated; where, in other words, time is not of the essence of the cause of action: as in the case of the common count for goods sold, &c. in reference to the statement that the defendant was indebted and promised payment.

(c) To lay incongruous or inconsistent days in stating material facts, is demurrable, although the day need not be proved as laid; for if the allegation of time were rejected as surplusage, a material fact would be laid without a time, which constitutes a good objection. See *Denison v. Richardson*, 14 East, 291.

Forms of Special causes of Demurrer to Declarations.

4. *For Misjoinder of Forms of Action.(a)*

For that there is a misjoinder of forms of action in the said declaration in this, that in the commencement thereof it is alleged, that the defendant has been summoned to answer the plaintiff in an action of debt, and the plaintiff demands a sum of money; and in the said first count the plaintiff, without laying any promise therein, claims and demands therein and thereby a sum of money; nevertheless the said second count is founded upon a supposed *promise* therein alleged to have been made by the defendant, and a breach thereof.

5. *For Misjoinder of Rights or Causes of Action.*

For that the plaintiff has improperly joined and included in his said declaration, rights or causes of action which cannot by law be blended or comprehended in the same action, in this, to wit, that the said first count is founded on a supposed cause of action stated to have accrued to the plaintiff as assignee of the said bankrupt,(b) [or, "as executor(c) of the last will and testament of the said E. F."'] and the second count is founded on a supposed cause of action alleged to have arisen and accrued to the plaintiff in his private or individual character.

6. *Demurrer to a Count for Duplicity or Doubleness.(d)*

That the said first count is double in this, that it is therein alleged that the defendant promised to pay the plaintiff a specific sum, to wit, twenty dollars

(a) To preserve simplicity in pleading, and avoid confusion at the trial, the forms of action can in no instance, (except debt and detinue,) be blended together in the same declaration. The misjoinder, or improper junction of forms of action, constitutes an objection to the *whole* declaration; and the demurrer, which may be general or special, should not therefore be to part only of the declaration; *Kingdon v. Nottle*, 1 M. & Selw. 355. As to writ of error, &c., see 42 vol. Stat. 72, §2. The plaintiff must amend his declaration, and cannot obviate the demurrer by entering a *nolle prosequi* as to one count or set of counts; *Tidd*, 9th ed. 681; *Rose v. Bowler*, 1 H. Bl. 108.

(b) An assignee of a bankrupt cannot comprise in his declaration a count on a cause of action accruing to him in that capacity, and a count on a cause of action stated to have accrued to him in his *private* character; *Richardson v. Griffin*, 5 M. & Sel. 294. But a count on promises

to the bankrupt, and another on promises to the assignee *as such*, will be good.

(c) Nor can an executor blend a cause of action resulting to him in his representative character with a claim accruing to him entirely in his private capacity; 2 Saund. 117c. And an executor defendant cannot be charged in the same declaration in his representative and personal capacities; 2 Saund. 117e.; see *ante*, VI. 39, 31c.

(d) 1 Chit. Plea. 5th ed. 259, 265, 564, 706. The rule against duplicity has for its object the prevention of the confusion which might arise if either of the parties were allowed to present to the consideration of the court or jury in one and the same pleading, that is, the same count or plea, &c., two or more distinct and material matters, each showing a good cause of action or sufficient ground of defence, upon the same point, subject or question. Bac. Ab. Pleas, K.; Com. Dig. Pl. C. 23. The objection of doubleness applies to pleas, see *post*, 630; and replications, see *post*, 635, and other

for the said horse; and also that he promised to pay him for the same so much as he therefore reasonably deserved to have;" and a breach of each of such supposed promises is laid in the said first count.

7. *That a Count contains Repugnant Promises.*^b

That the said — count contains two distinct promises alleged to have been made by the defendant, repugnant to and inconsistent with each, in this, that it is first alleged in the said — count that the defendant promised to redeliver the said horse on request, and it is afterwards alleged therein that he promised to redeliver the same on a particular day therein specified.^c

8. *That the Count lays the Cause of Action in the alternative.*

That the said — count is vague, uncertain and in the alternative, and is insufficient in this, to wit, that it is therein alleged that the defendant "wrote, or, published, or, caused to be published," the said libel, &c.

9. *That the Declaration wants certainty in stating the Goods, &c.(d)*

For that the said declaration wants sufficient certainty, and is defective in this, to wit, that the number, quantity, quality, description and value of the goods and chattels therein mentioned are not stated or shown therein.

subsequent pleadings. It prevents a demurrer and a plea to the same matter or part of a pleading. In the case of declarations the doctrine is in effect much evaded by introducing distinct counts apparently on different grounds or causes of action. Matter immaterial cannot operate to make a pleading double; no matter will operate to make a pleading double, that is pleaded only as necessary inducement to another allegation. No matters however multifarious will operate to make a pleading double that together constitute but one connected proposition or entire point; Bac. Ab. Pleas, K. 2. Duplicity is a ground of special demurrer only, 1 Saund. 337 a, note 3.

(a) See this instance, *Hart v. Longfield*, 7 Mod. 148; Steph. 3d ed. 258.

(b) Com. Dig. Pleader, C. 23; Steph. 3d ed. 377, and instances there; *Wyat v. Alund*, 1 Salk. 324.

(c) See *Hart v. Longfield*, 7 Mod. 148.

(d) Steph. 3d ed. 296; 1 Chit. Pl. 5th ed. 410;

1 Saund. 338, n. 7; 2 *id.* 74, n. 1. In *Pope v. Tillman*, 2 Eng. C. L. Rep. 243, where, in replevin, the plaintiff declared that the defendant, in a certain dwelling-house there took "divers goods and chattels of the plaintiff," without stating what they were, the court arrested the judgment, after judgment by default and inquiry executed. *Holmes v. Hodgson*, 8 Moore, 379, a general demurrer for this defect was allowed in an action of trespass for entering the plaintiff's house and taking his goods, although the defendant was under terms of pleading issuably. It seems that if a declaration in tort be sufficiently certain as to some of the goods but not so as to others, the demurrer should be confined to the defective part, it being divisible; see 2 Saund. 379, 74, n. 1, 171 a, n. 1; *Bucknal's case*, 5 Co. R. 34 b; *Coombe v. Talbot*, 1 Salk. 218; *Amory v. Broderick*, 5 B. & Ald. 712; see, however, *Holmes v. Hodgson*, 8 Moor, per Mr. Justice Burrough.

Forms of Special causes of Demurrer to Pleas.

10. *For not making Profert of a Deed, or Letters Testamentary, or Letters of Administration.*(a)

For that the plaintiff hath not brought into court or made profert in his said declaration of the said supposed *indenture* therein mentioned, [or, "letters testamentary of the said E. F. deceased," or, "letters of administration of the goods and chattels and credits which were of the said E. F. deceased,"] or shown any excuse for his omission so to do.

11. *To a Declaration against the Drawer or Indorser of a Bill—that Presentment for Payment to the Acceptor, and Notice of Dishonor, are not stated.*(b)

That it is not shown in the said first count or elsewhere in the said declaration that the said bill was presented to the said E. F. for payment when it became due, nor is any excuse for the omission of such allegation stated in the said declaration; and also for that it is not averred in the said declaration that the defendant had notice of the non-payment or dishonor of the said bill of exchange, or that there was or is any excuse or reason to excuse or dispense with the want of such notice.

12. *That the Amount of Damages is not laid in the Declaration.*(c)

That although the said action is for the recovery of damages sustained by the plaintiff for and in respect of the supposed causes of action and promises in the said declaration mentioned, yet the plaintiff hath not in his said declaration stated or shown the amount of damages, if any, sustained or claimed by him on occasion of such causes of action and promises.

SEC. VII. FORMS OF SPECIAL CAUSES OF DEMURRER TO PLEAS.

1. *That the Plea professes in the commencement to answer the whole Declaration, but contains in the body thereof an answer as to part only.*(d)

That there is not in the introductory part of the said plea any allegation or statement showing that the same is meant to be applied or pleaded to any par-

(a) This omission is ground for special demurrer only. Profert is only necessary as to letters testamentary and letters of administration, where the plaintiff sues as executor or administrator; and in the case of *deeds* or instruments *under seal*, and does not apply to written instruments, not under seal; Com. Dig. Pleader, O. 3; 2 Saund. 62 b, n. 5. As to excuses for making profert, see Read v. Brookman, 3 T. R. 156; forms, *post*, "Covenant."

(b) Either of these objections is available on general demurrer.

(c) Com. Dig. Pleader, C. 84, *ante*, 186, n. (a); but in *penal* actions no damages should be claimed in the declaration.

(d) 1 Saund. 28, n. 3; Steph. 2d ed. 245, 253;

Forms of Special causes of Demurrer to Pleas.

ticular part only of the said declaration, but the same, in the introductory part thereof, purports and professes to be a plea in bar of the whole action of the plaintiff; nevertheless the said plea contains matter, which, if true, constitutes an answer or defence to part only of the said declaration, to wit, the [*first*] count thereof; and the said plea does not contain or show any matter in denial or in confession and avoidance of the residue of the causes of action in the declaration mentioned.

2. *That the Plea improperly concludes to the Country instead of concluding with a Verification; or vice versa.*(a)

That the said plea ought to have concluded with a verification and not to the country, [*or, "that the said plea ought to have concluded to the country and not with a verification," as the case may be.*]

3d ed. 402; *Thomas v. Heathorn*, 2 B. & C. 477; 3 D. & R. 647, S. C.; *Clarkson v. Lawson*, 6 Bing. 266. This cause of demurrer is often occasioned by neglecting to attend to the forms prescribed for the commencements of pleas, in reference to the point whether the same plea contains an answer to the whole declaration, or comprises matter of defence to part only. If the plea begin "and the defendant, by E. F. his attorney, saith, that," &c., or, "and for a further plea in this behalf the defendant saith, that," &c. it professes to answer the whole declaration, and is bad in toto, if it show matter applicable to less than the whole of the declaration; see next chapter. The plea should be, "and the defendant, by E. F., his attorney, as to the said first count, (&c.) saith, that," &c. or, "and for a further plea as to the said first count the defendant saith, that," &c.; see next chapter. The objection would be waived by replying to the plea. The plaintiff might reply to the plea, as it affects the matter in the declaration, which is thereby answered, and sign judgment by default as to the remainder of the declaration, if there be no other plea answering such residue of the declaration, or any demurrer thereto. Where the plea professes in the introductory part to answer a portion only of the declaration, but con-

tains, in the body, matter of defence to the whole action, and which is so pleaded, the plaintiff may, it seems, demur to the plea without signing judgment as for want of a plea as to the part reserved or excepted in the introduction to the plea, at least if there be another plea to that part of the declaration; see *Gray v. Pindar*, 2 B. & P. 427; 1 Saund. 28, n. 3, and n. (g), 5th ed.; per *Bosquet, J.*, *Clarkson v. Lawson*, 6 Bing. 595. Where the plea in its introduction (see *per Cur.* *Everard v. Paterson*, 6 Taunt. 647,) and body is confined to part of the declaration, so that the plea is *pro tanto* correct, the course is to sign judgment as to the unanswered part, if there be no other plea applying thereto; and this is in the English practice an essential step to prevent what is termed a *discontinuance*; 1 Saund. 28, n. 3; *Everard v. Paterson*, 6 Taunt. 655-7, *per Cur.*; 2 Marsh. 394, S. C.; see *per Lord Denman, C. J.*, *Chitty v. Dendy*, 1 Har. & W. 170. This defect is cured by verdict. A discontinuance by the English law, arises if the plaintiff omit to reply to or otherwise notice one of several pleas.

(a) A defect in this respect is not objectionable unless the plaintiff demur specially; 2 Saund. 190, n. 5.

3. *For duplicity in alleging that there was no Consideration for the Acceptance or Indorsement, and also relying on Fraud, &c.(a)*

That the said plea to the said first count is double and multifarious, and contains two distinct answers or grounds of defence, either of which would, if the same were true, and could not be answered or avoided, constitute a bar to the said action as regards the said first count, in this, to wit, that it is not only alleged in the said plea that the defendant accepted the said bill for the accommodation of the said E. F., and without value or consideration, and that there was no consideration or value for the indorsement thereof by the said E. F. to the plaintiff; such facts, if true, being a defence and answer to the first count; but it is also averred in the said plea to that count, that the said E. F. procured the said acceptance by fraud and covin, and that the plaintiff took the said bill with notice thereof, and without consideration; which latter circumstances, if true, would also afford a defence as regards the said bill.

4. *That the plea is hypothetical or in the alternative, and does not confess or traverse.(b)*

That the said plea is hypothetical and insufficient in this, to wit, that it is therein alleged that "if the said E. F. escaped from the custody of the said defendant, he so escaped without the defendant's knowledge, and returned," &c. [or as another instance] in this, to wit, that it is therein alleged that the said supposed causes of action in the declaration mentioned "if any such there were," did not accrue within six years, &c. and that the said plea should have confessed that the cause of action once existed.

5. *That the Plea is argumentative.(d)*

That the said plea is argumentative and insufficient in this, to wit, that the defendant instead of simply pleading and traversing that the said goods and chattels were the goods and chattels of the plaintiff, hath denied the same in a

(a) See Steph. 2d. ed. 298; 3d ed. 252. The proper course is to have *separate* pleas. Duplicity or doubleness is objectionable only on special demurrer; 1 Saund. 337 a. note 3. It is often material to *demur* for this defect in a plea; for if the plaintiff plead, he must answer *each* distinct line of defence or material matter relied upon by the defendant; Steph. 2d. ed. 327; 3d ed. 278.

(b) See Steph. 2d ed. 430; 3d ed. 387, note xlv.; 1 Chit. Pl. 5th ed. 272, 572. It is a clear

principle that a plea must either deny the matter alleged, or, confess and avoid it.

(c) Griffiths v. Eyles, 1 B. & P. 413.

(d) Co. Lit. 303 a; Com. Dig. Pleader, E. 3; Stephen, 2d ed. 426, 3d ed. 384, n. xlv.; Digby v. Alexander, 6 Bing. 416; 1 M. & Sc. 556, S. C. This objection can be taken only by *special* demurrer; Com. Dig. Pleader, E. 3; 2 Saund. 319, n. 6.

Forms of Special causes of Demurrer to Pleas.

circuitous and argumentative manner, by alleging that "the plaintiff never had any goods or chattels."^(a)

6. *That the Matter is pleaded by way of recital or rehearsal, and not positively.*^(b)

That the said *indenture* in the said declaration mentioned, and the matters therein contained, are not pleaded or stated positively, or with sufficient precision or certainty, but by way of rehearsal or recital only, in this, to wit, that it is pleaded and averred that by the said indenture *it was witnessed*^(c) that the plaintiff did demise, &c.; whereas it should have been alleged that by the said indenture the plaintiff did demise, &c.

7. *That the Plea is repugnant.*^(d)

That the said plea is *repugnant*, and contains material allegations at variance and inconsistent with each other, in this, to wit, that although in the first part of the said plea it is alleged and admitted that the defendant accepted the said bill upon a good and sufficient consideration, and for value; and consequently at the time of such acceptance there was a consideration for the payment of the said bill when due, although the same is alleged to have subsequently failed in part, nevertheless in the subsequent part of the said plea the defendant avers that he has not received any value or consideration for the payment of the said bill.^(e)

8. *That the Plea contains a negative pregnant.*^(f)

That the traverse in the said plea of the allegation in the said declaration that the plaintiff demised the said messuage to the defendant, amounts to a

^(a) Stephen, 3d ed. 385.

^(b) Stephen, 2d ed. 431; 3d ed. 388; Bac. Abr. Pleas, B. 4. Upon this ground the word *whereas* (*quod cum*) in charging the act in trespass, thus ("For that *whereas*"), is open to demurrer; Step. 388; 1 Chit. Pl. 5th ed. 422. In *Ring v. Roxbrough*, 2 C. & J. 418, it was held a count in assumpsit laying the promise under a *whereas*, is not objectionable on general demurrer.

^(c) This is bad in a plea; *aliter* in a declaration; *Moore v. Jones*, Ld. Raym. 1536; Com.

Dig. Pleader, E. 3; 1 Saund. 274, n. 1; Stephen, 2d ed. 431; 3d ed. 389.

^(d) Any pleading containing inconsistent or repugnant allegations upon a material fact or subject connected with the party's case, is bad on demurrer; Com. Dig. Pleader, C. 23; Stephen, 2d ed. 420; 3d ed. 377; 1 Chit. Pl. 5th ed. 262, 265.

^(e) This was held to be a good cause of demurrer in *Byass v. Wylie*, 1 C., M. & R. 686; 1 Gale, 50, S. C.; 3 Dowl. P. C. 524, S. C.

^(f) A negative pregnant is such a form of

Forms of Special causes of Demurrer to Pleas.

negative pregnant, and is insufficient in this, that it is therein pleaded and alleged that "on the said — day of —, A. D. —," the plaintiff did not demise the said messuage to the defendant; and such form of traverse imports that there was some demise on some day of the said messuage by the plaintiff to the defendant.

9. *That the Plea traverses more than is alleged in the Declaration, and is too extensive.(a)*

That the said plea offers to put in issue and to affirm a matter not denied by the plaintiff, viz. the payment of interest to the said — day of —, A. D. —, on the said bond in the said declaration mentioned; whereas the declaration admits the payment of the interest in the said plea mentioned, and states only the non-payment of the principal sum: and the plaintiff therefore cannot safely join issue on the said plea; and the said plea by offering to put in issue the payment of interest, which is admitted, tenders an immaterial issue, and the said traverse is thereby too large.(a)

10. *That the Traverse in the Plea should have been in the disjunctive.(b)*

That the traverse in the said plea that the said ship and cargo were not

negative expression as implies or imports an affirmative; Steph. 2d ed. 424; 3d ed. 381. Such an allegation is necessarily ambiguous. This error is only the subject of a special demurrer; see *id.* 1 Saund. 207, n. 5. If the averment be that "on the 1st day of January, A. D. 1835, A. B. demised to C. D.," a traverse that "on the said 1st day of January, 1835, A. B. did not demise to C. D." is evidently pregnant with an admission that there was *some* demise. The day being immaterial, should not be traversed; 2 Saund. 319, n. b; 1 *id.* 268 a, note. A strong instance of this error occurred in *Myw v. Cole*, Cro. Jac. 87. There, in trespass for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him license to enter. The replication was considered to be bad (but aided by verdict,) it being that defendant "did not enter *per licentiam suam*."

(a) This was the form of demurrer in *Bishop v. Evans*, 1 Gale, 76; 2 C., M. & R. 12, S. C. It was held that if a declaration in debt on bond conditioned for the payment of principal and interest, assign a breach in non-pay-

ment of the principal only, a plea which avers payment of principal *and* interest is bad on special demurrer. Parke, B. "As the plea concludes to the country, there ought to be either a negative averment, with a positive allegation on the other side as to that only, or a negative to that which was averred positively, and to nothing else. That is the principle upon which a correct issue is penned." A plea cannot traverse that which has not been before alleged, or which is not necessarily implied, 1 Saund. 312, n. 4.

(b) Where an allegation comprising two matters, in any pleading, may be supported by proof in the disjunctive, a traverse in the conjunctive is bad, if the effect of it would be to impose on the party making the averment more extensive proof than is by law essential to the support of his case; see 2 Saund. 205, 207, n. 24, 319, n. 6; 1 Saund. 269 a, note 2; Steph. 2d ed. 288, 289, 3d ed. 244; Com. Dig. Pleader, G. 12, 15; 1 Chit. Pl. 5th ed. 647, 648. As an additional instance to that mentioned in the text, it may be noticed that a plea in bar to an avowry for £20 rent in arrear, is bad if it allege that

Causes of Demurrer to a Replication.

lost(a) is too extensive, and is insufficient in this, that the defendant hath not thereby denied that *neither* the said ship nor the said cargo was lost, as he ought to have done, inasmuch as the loss of either of them would be sufficient to support the said action of the plaintiff.

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11. *That a Plea to a Declaration in Trover amounts to the general issue or general traverse, as it sets up title and possession in the Defendant without giving the Plaintiff color.(b)*

For that the plaintiff hath in and by his said declaration declared as assignee of the said bankrupt, for a conversion of goods therein stated to have been in the possession of the said bankrupt before and at the time of his bankruptcy, and to have been converted by the defendant since the said bankruptcy; yet the defendant, instead of simply traversing or denying that the bankrupt was possessed of the said goods as of his own property, or had the possession thereof or any property therein, or that the plaintiff as assignee as aforesaid was entitled to the said goods, hath in and by his said plea specially pleaded and relied upon matter amounting, in effect, to a general traverse that the said goods were in the possession and were the property of the bankrupt before his bankruptcy, that is to say, that the bankrupt before his bankruptcy by deed assigned the said goods to the defendant, and that the defendant thereupon then took and hath thence hitherto had possession of the said goods, and the said plea concludes with a verification, and is a special plea of property and possession without in any manner confessing even a colorable title or right in the bankrupt or the plaintiff as his assignee.

SEC. VIII. CAUSES OF DEMURRER TO A REPLICATION.

That the Replication is double and Multifarious, and puts too many distinct allegations and matters in Issue: it being de Injuria to a Plea in Trespass of a right of Way exercised for twenty years.

That although the defendant hath in and by his said second plea justified the committing the said several supposed trespasses in the said declaration men-

"the said sum of £20 is not in arrear," instead of stating that "no part of it is in arrear," Cobb v. Bryan, 3 B. & P. 348. See further, post, 39. A defect of this kind can only be taken advantage of by a special demurrer; 1 Saund. 207, n. 5, 14, n. 2. An immaterial issue is not cured by verdict; Tidd, 9th ed. 921; 2 Saund. 319 a.

(a) That such a plea in an action on a policy

on ship and cargo is bad, see Goram v. Sweeting, 2 Saund. 205.

(b) Steph. 8d ed. 202. It seems that a plea to a declaration on a special contract is bad, as amounting to *non-assumpsit*, if it seek to put a different construction upon the contract by stating extraneous facts; see per Parke, B. in Gwilliam v. Daniell, 2 C. M. & R. 67.

Causes of Demurrer to a Rejoinder.

tioned, under and by virtue of the liberty, easement and privilege of passing and repassing across the said closes in which &c. in manner and for the purposes in the said second plea alleged, and such liberty, easement and privilege are claimed to exist as of right, and the matters in the said second plea stated are pleaded not merely as an excuse but as a justification of the trespasses in the declaration mentioned, yet the plaintiff, instead of directly and simply traversing one of the matters stated in such second plea, or confessing and avoiding such matters, hath, in and by his said replication to the said second plea, replied that the defendant of his own wrong and without the cause by the defendant in his said second plea alleged, committed the said trespasses; and also for that the plaintiff hath in and by his said replication to the said second plea, attempted to put in issue several distinct and material matters, that is to say, the user and exercise of the said liberty, easement and privilege in the said second plea mentioned, for twenty years, and the right to use and exercise the same during that period, the occupation by the said R. S. of the closes in the said second plea alleged to have been occupied by him, and his right to use and exercise the same liberty, easement and privilege, and also the question whether the said supposed trespasses were committed in the exercise of the said right or claim and for the purposes mentioned in the said second plea; and also for that the plaintiff hath in and by his said replication to the said second plea attempted to put in issue several distinct, material and traversable matters, all of which cannot properly be put in issue in and by such replication, and the said replication is double and argumentative, and no certain or sufficient issue can be taken thereon, and is in other respects insufficient, &c.

SEC. IX. CAUSES OF DEMURRER TO A REJOINDER.

That there is a departure; the Rejoinder departing from the Plea.(a)

That the said rejoinder is founded upon and contains matter, which is a departure from the matter or ground of defence relied upon and compromised in

(a) See as to this fault in pleading, 2 Saund. J.; Calvert v. Gordon, 7 B. & C. 809; Prince 84 a, note 1; 1 Chit. Pl. 5th ed. 681, 6th ed. 644; v. Brunette, 1 Bing. New C. 485; 5 M. & Sc. Steph. 3d ed. 410 to 418, 4th ed. 439, and instances there put. It may occur in a replication 342, S. C.; 1 Ch. Pl. 6th ed. 648. Bond to perform an award, Plea, no award. Replication an award, setting it out partly; a rejoinder setting out the whole award, and showing it was bad, held no departure; Fisher v. Pimbley, 11 East, 188; Dallow v. Watchhorn, 16 id. 39. In debt on an annuity bond, setting out condition, defendant pleaded that the annuity was granted on a pecuniary consideration, and that "no memorial" of the bond containing the names, &c., or pecuniary consideration, &c., was inrolled according to the statute. Replication that a memorial was inrolled (*setting it out*) and did contain names

Causes of Demurrer to a Rejoinder.

the said plea of the defendant, and does not fortify or support the same, in this, to wit, that in the said plea the defendant hath alleged and pleaded performance of the said condition of the said writing obligatory in the said declaration, and yet in the said rejoinder, in answer to the said replication of the plaintiff, showing and assigning a breach of the said condition, the defendant hath rejoined, admitting that he did commit such breach of the said condition, and showing matter supposed to be and pleaded as a justification of the non-performance of the said condition. (a)

and consideration, &c.: Verification, *per recordum*: Rejoinder, that the memorial contains false statements, especially in this, to wit, that the consideration was paid in notes, whereas it was not so paid, or otherwise, *modo, &c.*, and so there never was any such memorial as by statute required, inrolled, &c. according to the statute, concluding to the country. Special demurrer, 1st, that the rejoinder improperly concludes to the country; 2nd, that the matter thereof is a departure. The court held the rejoinder good; *Hickes v. Cracknell*, 3 M. & W. 72. The plea of *no award or no memorial*, pursuant, &c., means no valid award according to the submission, and no legal memorial according to the statute. These cases overrule much of the doctrine adduced by

the judges; *Praid v. Duchess of Cumberland*, 4 T. R. 585; 2 H. Bla. 280; but it seems that case may be supported on the ground, that the plea attacked the memorial, whereas the rejoinder impeached the deed. A departure can only be objected to by demurrer, but it seems a general demurrer will suffice, 2 Saund. 84 d; 1 Chit Pl. 6th ed. 648; *sed vide* 1 Saund. 117; Com. Dig. Pleader, F. 10; 6 N. & M. 607, n. (b).

(a) That the rejoinder is demurrable in such case, see 2 Saund. 83 c; Co. Litt. 304 a; Com. Dig. Pleader, F. 6. Plea, *no award*, (to debt on arbitration bond); replication, setting out award and breach; rejoinder, *performance* of award, *bad*, 2 Saund. 188.

CHAPTER III.

COMMENCEMENTS AND CONCLUSIONS OF PLEAS, REPLICATIONS, &c.

SECTION I. COMMENCEMENT AND CONCLUSION OF PLEAS AND REPLICATIONS IN ABATEMENT.

II. COMMENCEMENTS AND CONCLUSIONS OF PLEAS IN BAR, REPLICATIONS, REJOINDERS, SURREJOINDERS, REBUTTERS AND SURREBUTTERS; AND HEREIN,

1. Commencement and conclusion of a plea in bar to the whole declaration, concluding to the country.
2. Replication thereto.
3. Commencement, &c., of plea in bar to the whole declaration, concluding with a verification.
4. Commencement, &c., of plea in bar to one or more counts, or to part of a count, in a declaration.
5. Replication thereto.
6. Commencement, &c., of a second or further plea.
7. Commencement, &c., of plea in bar showing matter of defence arising after the action was commenced and before defendant had pleaded.
8. Commencement of a second or further replication.
9. Commencement and conclusion of the rejoinder.
10. Commencement of a second or further rejoinder.
11. Surrejoinder.
12. Rebutter.
13. Surrebutter.

SEC. I. COMMENCEMENT AND CONCLUSION OF PLEAS AND REPLICATIONS IN ABATEMENT.

Commencement and Conclusion of Plea in Abatement.

C. D. }
ats. } ——— Common Pleas, ——— Term, A. D. ———.
A. B. }

The said defendant,^b by J. S., his attorney, [or, in his own proper per-

(a) Insert the appearance term, or the term in which the declaration is entitled; 1 T. R. 278. (b) If the defendant have been sued by a wrong name, and wishes to defend by his right

son,"] comes and defends, &c., when, &c.,^b and prays judgment of the writ and declaration aforesaid, because he says, that, [*here state the grounds of abatement; see forms, post, 648 to 653, and conclude:*] and this the defendant is ready to verify; wherefore he prays judgment of the said [writ and] declaration, and that the same may be quashed, &c.; [*or, if the plea be "non-joinder," or "coverture," see the forms, post, 648, 651. Add signature and affidavit of truth of plea; see form, post, 649.*]

2. *Replication thereto.*^c

A. B. }
v. } ——— Common Pleas,^d ——— Term, A. D. ———.
C. D. }

The plaintiff saith that his said writ and declaration ought not to be quashed, because he saith that, [*&c., stating the matter, and if it be merely in denial, (as it is usually,) conclude thus:*] and this the plaintiff prays may be inquired of by the country, &c., [*or, if the replication be not a mere traverse, and contain new matter, conclude:*] and this the plaintiff is ready to verify; wherefore he prays judgment and his damages, [*&c., conclude as in a replication in bar, post, p. 642, form 5; or, perhaps the conclusion might be after the verification, with a prayer of judgment, "whether the said writ and declaration ought to be quashed." Add signature.*]

3. *Replication by Similitur.*

A. B. }
v. } ——— Common Pleas,^e ——— Term, A. D. ———.
C. D. }

And the plaintiff, as to the plea of the defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like. [*Add signature. This concludes the pleading.*]

name without having the same corrected by the clerk under the statute, (43 vol. Stat. 114, sec. 4,) the plea should begin thus: And T. D., against whom the plaintiff hath issued the summons, and declared in this suit, by the name of C. D., comes and defends, &c.

(a) Pleas to the jurisdiction and by married women, should be pleaded in person; 2 Saund. 209, a; 2 Bla. Rep. 1094. Other pleas in abatement may be pleaded in person or by attorney; 2 Saund. 209, a.

(b) The words "when, &c.," are deemed

full or half defence, as occasion may require; 2 Saund. 209, c; 8 T. R. 631.

(c) If the plea be defective, the plaintiff may demur, (generally,) and the defendant cannot amend. The judgment in favor of the plaintiff upon a demurrer, is respondeas ouster; 2 Saund. 211, n. 3.

(d) The same term in which the plea is entitled.

(e) The same term, in general, in which the plea and declaration are entitled.

SEC. II. COMMENCEMENT AND CONCLUSION OF PLEAS IN BAR, REPLICATIONS, REJOINDERS, SURREJOINDERS, REBUTTERS AND SURREBUTTERS.

1, 2, 3. Commencement and conclusion of a plea in bar to the whole declaration,* with a verification, or to the country.

C. D. }
ats. } ——— Com. Pleas, ——— of the term of ———, A. D. ———.
A. B. }

The said C. D., by E. F., his attorney,⁴ [or, "in his own proper person," or, if the defendants be husband and wife, say: "the said C. D. and J.,

(a) The modern English form of commencement of pleas in bar to the whole declaration, is thus:

C. D. }
ats. }
A. B. }

"The defendant, by J. S., his attorney, says," &c.; and these few words are substituted for the old form, as follows: "And the said C. D., by J. S. his attorney, comes and defends the wrong and injury, when, &c., and says that the said A. B. ought not to have or maintain his aforesaid action thereof, against him, because he says." No allegation of *actionem non*, is now necessary in England, where the plea is pleaded in bar of the whole action generally; and a plea pleaded without such formal parts, is taken as pleaded in bar of the action.

So, no allegation of *actio. non*, or precludi non, or prayer of judgment, is necessary in any pleading subsequent to a plea pleaded in bar of the whole action generally; but the replication and subsequent pleading, pleaded without these formulæ, are taken as pleaded in bar, or maintenance respectively of the action.

The pleas in this work were originally prepared with forms, in accordance with the modern English practice, believing that they would be sanctioned by our courts. But supposing that some of the bar might not agree with me, I have adopted the old English form.

(b) When one of several defendants pleads separately, the title, commencement and conclusion of the plea in bar, if in *assumpsit*, *covenant* or *debt*, should be thus:

Common Pleas.

C. D. [the name of the party pleading.] im- }
ats. pleaded with J. J. [and others.] }
A. B. }

The said C. D., impleaded, &c., by E. F., his attorney, comes and defends, &c., and says that the said A. B. ought not to maintain

his aforesaid action thereof against him, because he says, [here set forth the matter of defence; as to the body of the plea, see note to form 2, chapter 5, post; conclude the plea as follows:] and this the said C. D. is ready to verify; wherefore he prays judgment if the said plaintiff ought to maintain his aforesaid action thereof against him.

If, however, the plea be entitled in the usual form, "C. D. et al. ats. A. B.," it will be a mere informality, which the court will permit to be corrected at any time; 20 Wend. 680.

If there be several defendants, and the defence is in its nature joint, they may either join in the same plea, or each may plead separately; 2 Johns. Rep. 382. And one defendant may plead in abatement, another in bar, and another demur; 1 Chitt. Pl. 596. But personal defences, such as *coverture*, *infancy*, &c., should be pleaded separately; Id. 598.

Where several defendants in an action of debt joined in pleas in bar, the court would not permit one of them afterwards to sever and put in a plea going to his personal discharge; 20 Johns. Rep. 153.

(c) This is usually the term next preceding the period when the plea is filed; but the words, "Of the term of —, A. D. —," are not generally inserted in pleas and replications, and seem wholly unnecessary; for the plea is pleaded when filed, and the time of filing is indorsed upon it by the clerk.

(d) An infant or feme covert cannot plead by attorney. Where an infant pleads, instead of the words, "by E. F., his attorney," insert in the place of those words, the following: "by G. H., admitted by the said court here, as guardian of the said C. D., to defend for the said C. D., who is an infant under the age of [twenty-one years, or if the defendant is a female, say eighteen years.]

Commencement and Conclusion of Pleas, &c., in Bar.

his wife, by E. F., their Attorney, comes and defends the [wrong, *or, in case of trespass or ejectment, say, force,*] and injury when, &c., and says that the said A. B. ought not to [maintain, *or, if matter pending the suit be pleaded, say "further"*] maintain] his aforesaid action thereof against him, because he says, that [&c., *here state the matter of defence and conclude either with a verification, thus :*

And this the defendant is ready to verify ; wherefore he prays judgment if the said plaintiff ought [*if matter pending the suit be pleaded, say, further,*] to maintain his aforesaid action thereof against him : [*or, conclude to the country, thus :*

And of this, he, the said defendant, puts himself upon the country, &c.

E. F., Attorney for defendant.

4. *Commencement and conclusion of Plea in Bar to the whole of one or more several counts, or to a part of a count in a declaration.*

C. D. }
ats. } ——— Common Pleas, ——— Term, A. D. ———.
A. B. }

The defendant, by S. S., his attorney, [*or, in his own proper person,*] as to the said first count of the said declaration, [*or, as to the sum of ——— dollars, parcel of the moneys in the said declaration, or, in the said first count mentioned, or, as the case may be ; see the various forms, post,*] says, that the said plaintiff ought not to maintain his aforesaid action thereof against him, because he says,* that, [*state the defence, and if the plea be merely a denial, conclude to the country, as in the preceding form, or, if it introduce new matter, conclude thus :*] and this the defendant is ready to verify ; wherefore, he prays judgment, if the plaintiff ought to maintain his aforesaid action thereof against him, &c.

And as to the said second count, [*or, as to the residue of the said moneys in the said declaration mentioned, or, in the said first count mentioned, or, as to the*

(a) A plea must conclude either *to the country*, which indicates an issue triable by jury, or, (to the court) with a verification. The following rules show when the plea should conclude to the country, or with a verification. When the plea is merely a *denial* of a whole or part of the plaintiff's allegation, whether such allegation be the affirmative or negative, it must conclude to the country, because the plaintiff can have nothing further to advance in reply to such a plea ; for, if issue be well tendered in substance and form, the opponent must accept or join in it. But when the plea confesses the plaintiff's case as alleged, but avoids it by the introduction of

new matter, (when it is in *confession and avoidance*), the plea must conclude with a verification, in order that the plaintiff may, at his election, in reply, either deny the new matter, or, admitting it, obviate its effect by an additional statement.

It seems that no verification, is, in general, necessary, in a negative pleading, though in practice a verification is generally added. The reason why no verification is necessary to a negative plea, is, that such plea is incapable of proof. Steph. Pl., 4 Am. Ed. 435.

As to a plea of *null tiel record*, see post., Plea of *null tiel record*.

Commencement and Conclusion of Pleas, &c., in Bar.

residue of the said declaration, *as the case may be,*] the defendant says, that, [*&c., stating the matter of defence, and concluding with a verification, or to the country, as directed in the preceding form and note.*]

5. *Replication to a Plea in Bar to one or more several counts, or to part of a count.*

A. B. }
v. } ——— Common Pleas, ——— Term, A. D. ———
C. D. }

The plaintiff, as to the said plea, [*or, the first plea, or, as to the said plea of the defendant to the said sum of — dollars, parcel of the sum in the (first) count of the declaration mentioned, or, as the case may be,*] says, that he ought not to be barred from maintaining his aforesaid action thereof against him, because he saith, that, [*&c., conclude to the country, thus:*]

And of this the plaintiff puts himself upon the country.

Or, conclude with a verification, thus:

And this the plaintiff is ready to verify; wherefore he prays judgment, and his damages by him sustained on occasion of the non-performance of the promise, [*in the said first count of said declaration mentioned, or, as to the said sum of — dollars, parcel, &c. &c.,*] to be adjudged to him, &c. [*This prayer of judgment applies to assumpsit.*] *In Debt, the form is:* "Wherefore he prays judgment and the said debt in said first count mentioned, (*or, debt, or sum of — dollars, parcel, &c., as the case may be,*) together with his damages by him sustained on occasion of the detention thereof to be adjudged to him." *In Covenant, the prayer of judgment is:* "Wherefore he prays judgment and his damages by him sustained by reason of the said breach of the covenant by him, *first* above assigned to be adjudged to him, &c." *In Case and Trespass, the prayer of judgment is:* "Wherefore he prays judgment, together with his damages by him sustained on occasion of the committing of the said ["grievan-

(a) When the replication puts in issue the whole substance of the defendant's plea, it may conclude to the country, and need not conclude with a verification. Thus to debt on bond, the defendant craved oyer, and after reciting a mortgage deed, which showed the condition to be for the payment of a sum of money on a specified day, according to the tenure of a proviso in the indenture, and for the performance of the covenants therein, pleaded that there were no negative or disjunctive covenants in the deed, and that he paid the money mentioned in the condition on the specified day, according to the effect thereof, and performed all the covenants and pro-

visos in the indenture on his part to be performed. The replication denied the payment of the money, and concluded to the country; and it was held good on special demurrer, as the substance of the plea was the payment of the money, which the plaintiff denied. 16 Eng. C. L. Rep. 393. But in the case of a bond conditioned that a clerk, &c., should account for, and pay over moneys, to a general plea of performance, the plaintiff's replication showing the receipt of particular sums, &c., and, not accounting for them, should conclude with a verification. 2 Burr. 774; Cowp. 575; but see 1 Saund. 102.

ces" in *trespass state*, "trespasses"] in the introductory part of the said — plea mentioned, to be adjudged to him, &c. *As to Replevin, see post, Replevin.*

6. Commencement of a second or further Plea.*

And for a further plea in this behalf [or, if the plea be to part only, the introductory part of the plea must be confined to the matter answered; see note, ante, p. —, as thus:] and for a further plea as to the said — count; or, and for a further plea as to the sum of — dollars, parcel of the moneys in the declaration [or, first count] mentioned; or, and for a further plea as to the said supposed promise so far as it relates to, [&c.]; or, in covenant, and for a further plea as to the said supposed breach of covenant first above assigned, [&c.]; or, in trespass, to part of a count, say, and for a further plea as to the breaking, [&c.], or, assaulting [&c., enumerating the particular trespasses meant to be denied or justified,] the defendant says, that the plaintiff ought

(a) *Several Pleas.* At common law the defendant might always plead several pleas, provided each went to a different and distinct part of the declaration; but could not plead two or more pleas to the same part. But by statute (Stat. 661, §63,) the defendant is allowed to plead, with leave of the court, as many several matters as he shall think necessary to his defence. This statute is copied from 4 & 5 Ann. c. 16, s. 4 & 5.

Under this statute the defendant may plead together several matters, which, at first view, may appear inconsistent with each other. Thus, in *assumpsit*, he may plead with the general issue, *infancy*, or the statute of limitations, or set off; Arch. Pl. 237; 5 Taunt. 340; Str. 389; 1 Burr. Pr. 174; 1 Tidd's Pr. 708; or judgment recovered; Fortesq. 337; or *non est executor*; or *plene administravit*; Com. Dig. Pl. E. 2.

In debt he may plead with the general issue, a discharge, or *infancy*, or payment; 1 Chit. Pl. 8 Am. ed. 562.

In covenant he may plead *non est factum* and payment; 3 Pick. 388; 1 Gall. 19; and it seems, *non est factum* and general performance; 1 Harr. & Gill, 324.

In trespass, not guilty, a justification, and accord and satisfaction; or not guilty and *non assauit domine*; 5 Bac. Ab. 448, or not guilty and *liberum tenementum*; Tidd, 9th ed. 656; or a licence and justification; Bac. Ab. Pleas, K. 3.

But the general rule is, that where the matter of the second plea is involved in the first and may be as well proved under the first plea, or where the two pleas are palpably repugnant and contradictory, so that what is denied in the one is expressly confessed in the other, the two pleas cannot be joined; 15 Mass. 54, 55.

Therefore the defendant cannot plead *non assumpsit*, 4 T. R. 194, or *non est factum*, 2 Bla. Rep. 905, to the whole declaration, and a tender as to part; or *non est factum* and a tender to the whole declaration, 4 Taunt. 459, or *non assumpsit* to part and tender to the whole, Story's Pl. by Ol. 132, or *nil tiel record*, and *nil debit* or payment, 1 Johns. Cas. 104; though it seems, as already stated, that *non est factum* and payment may be pleaded together.

So, a defendant will not be permitted to plead the general issue, and also a plea of justification, where a statute allows him to give in evidence under the general issue the special matter stated in the plea; 1 Chit. Pl. 8 Am. ed. 561.

But it should be remarked that courts in determining what pleas are inconsistent with each other, and cannot therefore be joined, have not adopted any very well defined rules.

(b) The omission of the words "by leave of the court first had and obtained," is no cause of demurrer; 1 Chit. Pl. 8 Am. ed. 562; Cit. Andr. 108; 1 Wils. 219; Cowp. 500, 501; and it is now omitted in England, 1 Chit. Prec. 24.

not to maintain his aforesaid action thereof against him, because he says, that [*&c.*, and conclude as directed ante, form 5, p. 642.

7. *Plea in Bar showing matter of defence arising after the action was commenced and before defendant had pleaded.**

C. D. }
ats. } ——— Common Pleas, ——— Term, A. D. ———
A. B. }

The defendant, by J. S., his attorney, [*or, in his own proper person,*] says that the plaintiff ought not further to maintain his action,^b because he saith that, [*&c.*, showing that the cause of defence arose after writ or declaration, and before the day of pleading; see forms, post; conclude:] and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action; [*or conclude to the country, as ante, form 5, p. 642.*]

J. S., Attorney for Defendant.

8. *Commencement of a second or further Replication.**

And the plaintiff by allowance of the Court for this purpose first obtained, for a further replication to the said plea, [*or, first plea, as the case may be,*]

(a) As to the plea *puis darrien continuance*, after defendant has before pleaded, see post.

(b) If a plea in bar be founded on any matter arising after the commencement of the action, though it be not pleaded after a previous plea, it has the commencement and conclusion of *actio. non ulterius*; and *actionem non*, generally, would be improper, for that formula is taken to refer in point of time to the commencement of the suit, and not to the time of the plea pleaded; Steph. Pl. 4 Am. ed. 401.

In *assumpsit*, any thing which shows that the plaintiff never had any cause of action, and most matters in discharge of the action showing that the plaintiff had no subsisting cause of action at the time the suit was commenced, may be given in evidence under the general issue. See post, Pleas in *Assumpsit*, note. But when the action is well brought, and the defendant has some matter in discharge arising afterwards, (such as payment, bankruptcy or the like,) he should plead it specially in bar of the further maintainance of the action; 5 Hill, N. Y. 317, 393. This rule requiring a special plea in such case, relates of course to matters which are a full

defence to the action; for a partial defence never can be pleaded, because every plea in bar must contain a full answer to the declaration or count to which it is pleaded. Most partial defences may therefore be given in evidence under the general issue.

(c) By statute, 43 Vol. Stat. 115, Sec. 7, it is provided, that, "whenever it shall become necessary for the attainment of justice, the court may allow a plaintiff to reply several matters to a plea of a defendant, and allow a defendant to rejoin several matters to a replication of the plaintiff."

This statute, passed March 12, 1845, is too recent for the practice to be settled under it, and the question whether several matters can be replied to a plea, &c., without first obtaining the allowance of the court, has not been determined. The statute authorizing a defendant to plead several matters, provides that it shall be lawful for the defendant, "with leave of the court," to plead several matters, &c.; Stat. 661, §63. This leave of the court is never asked, nor is it necessary to aver in the plea that leave was obtained. Perhaps

says, that he ought not to be barred from maintaining his aforesaid action thereof against the defendant, because he saith that, [*&c., conclude to the country or with a verification as ante, form 5, p. 642.*]

9. Commencement and Conclusion of the Rejoinder.

The rejoinder is necessary where the replication is a tender of issue, not a joinder in issue; or concludes with a verification. In the former case, the rejoinder is as follows:

C. D.	}	—— Com. Pleas, —— Term, A. D. ——.
ats.		
A. B.		

The defendant, as to the said replication to his said plea, [*or, first plea,*] and whereof the plaintiff hath put himself upon the country, doth the like.

If the replication concludes with a verification, the rejoinder is thus:

The defendant, as to the said replication of the plaintiff to the said plea [*or, first plea*] of the defendant, says that by reason of any thing therein, the plaintiff ought not to maintain his said action, because he says, that [*&c. stating the matter relied upon, and if such matter be merely in denial of the matter contained in the replication, conclude to the country, thus:*] and of this the defendant puts himself upon the country, and the plaintiff doth the like, &c.

[*But if the rejoinder introduce new matter, it should conclude with a verification, thus:*] and this the defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to maintain his said action against the defendant.

10. Commencement of a second or further Rejoinder.*

And the defendant, by allowance of the court for this purpose, first had, and obtained, for a further rejoinder to the said replication [*or, second replication, as the case may be,*] to his said plea, [*or, first plea,*] says [*&c., and so proceed with actio non, &c., and conclude as directed in the preceding form.*]

parties will be permitted to reply and rejoin several matters without any previous allowance by the court, in like manner and under the same restrictions as a defendant has been permitted to plead several matters without leave of the court, otherwise very great delay and vexatious contests about the allowance of these replications and rejoinders will arise. On the other hand, by permitting several replications to be

filed without limit, a great variety of issues may be made up, and much confusion arise in the pleadings.

In the State of New York several replications are permitted, but leave is granted upon affidavit.

(a) See as to rejoining several matters, the preceding note.

11. *Surrejoinder.*

A. B. }
 v. } ——— Com. Pleas, ——— Term, A. D. ———.
 C. D. }

If the rejoinder conclude to the country, it is thus : And the plaintiff, as to the said rejoinder to his said replication to the said plea [*or, first plea, as the case may be,*] of the defendant, and whereof the said defendant hath put himself upon the country, doth the like.

If the rejoinder conclude with a verification, and the surrejoinder be a mere denial thereof, it will conclude, "and this the plaintiff prays may be inquired of by the country," &c.

If the surrejoinder introduce new matter, it should conclude with a verification, thus : and this the plaintiff is ready to verify, wherefore he prays judgment, &c.

12. *Rebutter.*

If the surrejoinder be not a joinder in issue, but conclude to the country, the rebutter will be as follows :

C. D. }
 ats. } ——— Com. Pleas, ——— Term, A. D. ———.
 A. B. }

And the said defendant, as to the said surrejoinder to the said rejoinder to the said replication to the defendant's said plea, [*or, first plea, as the case may be,*] and which the plaintiff hath prayed may be inquired of by the country, doth the like.

13. *Surrebutter.*

The surrebutter is necessary if the rebutter do not complete the issue. It may be in this form :

A. B. }
 v. } ——— Com. Pleas, ——— Term, A. D. ———.
 C. D. }

And the plaintiff, as to the said rebutter of the defendant, whereof he hath put himself upon the country, doth the like.

CHAPTER IV.

PLEAS, &c. IN ABATEMENT.

- SECTION I. STATUTORY PROVISIONS RELATING TO PLEAS IN ABATEMENT.**
- II. FORM OF PLEA IN ABATEMENT OF THE NON-JOINDER OF A JOINT CONTRACTOR.
 - III. FORM OF AFFIDAVIT OF TRUTH OF PLEA IN ABATEMENT.
 - IV. REPLICATION THAT THE DEFENDANT ALONE PROMISED.
 - V. REPLICATION TO A PLEA OF NON-JOINDER THAT THE OTHER CONTRACTOR IS A CERTIFIED BANKRUPT.
 - VI. TO A PLEA OF NON-JOINDER—NEW ASSIGNMENT THAT THE ACTION IS FOR DIFFERENT PROMISES.
 - VII. PLEA IN ABATEMENT OF THE NON-JOINDER OF A CO-EXECUTOR AS A DEFENDANT.
 - VIII. PLEA IN ABATEMENT—COVERTURE OF THE DEFENDANT.
 - IX. REPLICATION—THE DEFENDANT IS NOT MARRIED.
 - X. PLEA IN ABATEMENT OF THE PENDENCY OF ANOTHER ACTION FOR THE SAME DEMAND.
 - XI. ANOTHER FORM OF PLEA IN ABATEMENT OF THE PENDENCY OF ANOTHER ACTION.
 - XII. INFANCY OF PLAINTIFF.
 - XIII. PLEA IN ABATEMENT AS TO PART (COVERTURE) AND IN BAR (GENERAL ISSUE AND COVERTURE, IN ASSUMPSIT) TO RESIDUE.
 - XIV. REPLICATION BY WAY OF ESTOPPEL TO PLEA IN ABATEMENT OF COVERTURE.
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SEC. I. STATUTORY PROVISIONS RELATING TO PLEAS IN ABATEMENT.

Pleas for misnomer are now abolished : “ No plea in abatement for a misnomer shall be allowed in any personal action, but in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name, upon notice to the opposite party, issued by the clerk of the court, founded on an affidavit of the right name, and in case such application shall be discharged, the costs of the same shall be paid by the party applying, if the clerk shall think fit.”

The Statute^b provides : “ That no plea in abatement, other than a plea to

(a) 43 v. Stat. 114.

(b) Swan's Stat. 661, § 65.

Non-Joinder of Joint Contractor.

the jurisdiction of the court, or when the truth of such plea appears of record, shall be admitted or received, unless the party offering the same, file an affidavit of the truth thereof; and where a plea in abatement shall be adjudged insufficient, the plaintiff shall recover full costs, to the time of overruling such plea."

The Statute passed March 12th, 1845,^a provides: "That no action then pending, or which might thereafter be commenced in the name of a *feme sole*, shall abate in consequence of the marriage of such *feme sole*; and in case of the marriage of any such *feme sole*, pending an action in her name, by making a suggestion of such marriage in court, and the insertion of the name of the husband in the proceedings, such suit may be conducted to trial, judgment and execution, in all other respects as if no such marriage had occurred."

SEC. II. FORM OF PLEA IN ABATEMENT OF THE NON-JOINDER OF A JOINT CONTRACTOR.^b

C. D. }
ads. } — Common Pleas, of the Term of —, A. D. —.
A. B. }

The defendant, by E. F., his attorney, [or, "in person,"] comes and defends, &c., when, &c., and prays judgment of the said writ and declaration, because he says that the supposed promises,^c [or, "promise;" *if one only be laid,*] in the said declaration mentioned,^d were *afid* each of them was made by the defendant jointly with one G. H.,^e who is still living, to wit, at —, and within the jurisdiction of this court, and not by the defendant alone; and this the defendant is ready to verify; wherefore, inasmuch as the said G. H. is not named in the said writ and declaration together with the defendant, he, the defendant, prays judgment of the said writ and declaration, and that the same may be quashed, &c. [*To be signed by counsel, and add affidavit of truth, as infra.*]

(a) 43 v. Stat. 114, §3.

(b) The law as to joinder of defendants, &c., and as to pleas in abatement for non-joinder, has been already stated; Vol. I., 75 to 79; 102, 103, and see 59 to 63.

(c) The appearance term, or term next preceding the filing of the plea.

(d) A plea in abatement, unless pleaded by a married woman, may be pleaded in person or by attorney; 2 Saund. 209, a. Pleas to the jurisdiction are to be pleaded in person.

(e) In *debt*, the form is, "that the said several supposed causes of action in the declaration mentioned and each of them accrued against, and the said supposed debts, were and each of

them was contracted, and became due from the defendant jointly with one G. H., who is still living, and that neither of such supposed causes of action accrued against, nor was either of such debts contracted by, nor did either of them become due from the defendant alone, and this, [*&c.*]

(f) It is usual to add here, "if any such were made," but it may be doubtful whether this is not incorrect; 1 Chitty's Prac. 198.

(g) The plea must give truly the names of the parties liable. If a party liable be omitted, the plea will not be supported; Godson v. Good, 1 Eng. C. L. Rep. 492.

Replication that Defendant alone joined.

SEC. III. FORM OF AFFIDAVIT OF TRUTH OF PLEA IN ABATEMENT.*

—— Common Pleas : Between { A. B., plaintiff,
and
C. D.,^b defendant.

C. D., the defendant in this cause, maketh oath and saith, that the plea hereunto annexed, is true in substance and fact.^c

Sworn,^d [*&c.*]

C. D.

SEC. IV. REPLICATION THAT THE DEFENDANT ALONE PROMISED.

A. B. }
v. } —— Common Pleas of the —— Term, A. D. ——.
C. D. }

The plaintiff says that his said writ and declaration ought not to be quashed, because he saith that the said several promises were not, nor was either of them, made by the defendant jointly with the said G. H.,^e in manner and form as the defendant hath in his said plea alleged; and this the plaintiff prays may be inquired of by the country, &c., and the defendant doth the like, &c.

J—— S——, Attorney for plaintiff.

(a) The plea is a *nullity*, and plaintiff may sign judgment unless there be this affidavit. Exception in case of matter of record; ante, p. 648.

(b) Be accurate as to the title of the cause. An affidavit entitled "E. P. and Mary Ann, his wife, defendants," the declaration being "E. P. and Ann Mary, his wife, defendants," held bad; 1 Chit. Prac. 198.

(c) This form should be adhered to; affidavit that "the plea is true," insufficient; *Onslow v. Booth*, Stra. 795.

(d) If the affidavit is sworn before the declaration is filed, the plaintiff may treat the plea as a *nullity*. But an affidavit sworn in Liverpool on the day the declaration was delivered in London, was held not to be a *nullity*; *Lang v. Comber*, 4 East, 348; see *Baskett v. Barnard*, 4 M. & Sel. 332. In England the plea is not a *nullity*, though perhaps irregular, if the affidavit be sworn before defendant's attorney; 3 M. & Sel. 154.

(e) Or, perhaps, the replication may be, "that the promises were and each of them was made by defendant only;" and *semble*, in such case the

plaintiff certainly has to begin; *Young v. Bairner*, 1 Esp. R. 103. Where the replication is as in the text, it appears that the issue is on the defendant, and that he should begin, at least, where the debt is admitted; 2 Stark. 1. Mr. Starkie adds in a note, "In *Roby v. Howard*, 2 Stark. R. 555, Abbott, C. J., held that the plaintiff ought to begin. So in *Stansfield v. Levy*, 3 *id.* 8. But in the latter case the plaintiff having proved the amount of his demand, was allowed to reserve his evidence in answer to the plea, until the evidence in support of it had been adduced on the other side. In the subsequent case of *Laeon v. Higgins*, 3 Stark. R. 178, his lordship intimated, that if the plaintiff elected to begin, he ought to go into the whole of his case; but there defendant's counsel began, having admitted the amount of the debt claimed. Bayley, J., at the York Summer Assizes, 1821, directed that "defendant should begin, and that the amount of damages should, if necessary, be tried afterwards." The third party named in the plea is a competent witness for plaintiff; but it appears not for defendant, without a release of his share of costs; 2 Stark. Ev. 3.

Replications—Bankruptcy—New Assignment—Plea—Non-Joinder of Co-Executor.

SEC. V. REPLICATION TO A PLEA OF NON-JOINDER, THAT THE OTHER CONTRACTOR IS A CERTIFICATED BANKRUPT.

The plaintiff saith that his said writ and declaration ought not to be quashed, because, he saith, [*&c.*, *showing the bankruptcy, specially at length, as in the special forms, post*, "Bankrupt," *post*, Chap. v. no. 29;] and this the plaintiff is ready to verify; wherefore, *&c.* *Conclude as directed, ante*, 648.]

SEC. VI. TO A PLEA OF NON-JOINDER—NEW ASSIGNMENT THAT THE ACTION IS FOR DIFFERENT PROMISES.^a

A. B. }
v. } ——— Common Pleas of the ——— Term, A. D. ———.
C. D. }

And the plaintiff says that his said writ and declaration ought not to be quashed, because he says that he issued his said writ and declared thereon, not for the non-performance of the promises in the said plea, and which are therein alleged to have been made, and which were made by the defendant and the said G. H. jointly, but for the non-performance by the defendant of other and different promises, made by the defendant alone to the plaintiff, to wit, the promises in the said declaration mentioned, made as therein alleged, being other and different promises to the promises in the said plea mentioned, and therein alleged to have been made by the defendant and the said G. H. jointly; and this the plaintiff is ready to verify; wherefore he prays judgment and his damages, by reason of the non-performance of the promises above newly assigned to be adjudged to him, &c.

J—— S——, Attorney for plaintiff.

SEC. VII. PLEA IN ABATEMENT OF THE NON-JOINDER, OF A CO-EXECUTOR AS A DEFENDANT.^b

The defendant, by —— his attorney, comes and defends, &c., when, &c., and prays judgment of the said writ and declaration, because he says that the said J. L. made his last will and testament in writing, and thereby made, constituted, and appointed the defendant and one T. L. executors of his said last will and testament, and afterwards, to wit: on [*&c.*] died, after whose death, to wit: on [*&c.*] and at said county of ——, and before the court of common pleas of said county, the said T. L., together with the defendant, as executors of the said last will and testament of the said J. L., duly proved the last

(a) It seems to be proper to new assign where the action is brought to recover a separate debt due from the defendant, and it is admitted that there is a debt due from him and the third party jointly. The defendant may rejoin that he did

not promise or set up a special defence to the new assignment as in ordinary cases.

(b) See 2 Williams on Executors, 1189; 1 Chit. Pl. 5th ed. 59.

Plea of Coverture—Replication thereto.

will and testament of the said J. L., and letters testamentary of the said J. L., were then and there granted, in due form of law, to said defendant and said T. L., by said court, and they took upon themselves the burthen of the administration of said last will and testament of said J. L., and administered divers goods and chattels which were of the said J. L. at the time of his death, which said T. L. is still living; and this the defendant is ready to verify; wherefore, inasmuch as the said T. L. is not named in the said writ and declaration, together with the defendant, as executor as aforesaid, he, the defendant, prays judgment of the said writ and declaration, and that the same may be quashed. [*Semble, add profert, ante, 190, counsel's signature, and add affidavit of the truth of the plea, as ante, §649.*]

SEC. VIII. PLEA IN ABATEMENT—COVERTURE OF DEFENDANT.^a

C. F., sued by the name of C. D. }
ads. }
A. B. }

The defendant C. F., sued by the name of C. D., in person, [*ante, 640, note d,*] comes and defends, &c., when, &c., and prays judgment of the said writ and declaration, because, she says, that at the time of the commencement of this suit, she was, and still is married to one E. F., who is still living; and this the defendant is ready to verify; wherefore, because the said E. F. is not named in the said writ and declaration, the defendant prays judgment of the said writ and declaration, and that the same may be quashed. [*Counsel's signature and affidavit of truth, as ante, 649.*]

SEC. IX. REPLICATION—THAT DEFENDANT IS NOT MARRIED.^b

A. B. }
ads. }
C. D. }

The plaintiff says that the said writ and declaration ought not to be quashed, because he says that she, the defendant, was not, nor is she married to the said G. H., in the said plea mentioned, in manner and form as the defendant hath in her plea alleged; and this the plaintiff prays may be inquired of by the country, &c.

(a) The plaintiff's coverture after the contract was made, cannot be pleaded in abatement. 43 Ev. 2d ed. 399, 390; 1 Chit. Pl. 5th ed. 483, 511; Milnes v. Milnes, 3 T. R. 827.
(b) If plaintiff admit the coverture, but rely on any exception to the general rule, he must reply specially.

Pendency of another action.

SEC. X. PLEA IN ABATEMENT OF THE PENDENCY OF ANOTHER ACTION FOR THE SAME DEMAND.^a

C. D. }
 ads. } ——— Com. Pleas of the term of —, A. D. —.
 A. P. }

The defendant, by —, his attorney, [*or*, “in person,”] comes and defends, &c., when, &c., and prays judgment of the said writ and declaration, because, he says, * that before the commencement of this suit, to wit, on, [*&c. date of summons in first action,*] at, [*&c.*] the plaintiff caused to be issued a writ of summons by the clerk of the court of common pleas of said county of — aforesaid, and out of said court, against the defendant, in an action [*on promises, or, as the case may be,*] whereby the State of Ohio commanded, [*set out summons*] and upon which said writ were the following endorsements, [*set out indorsements on writ,*] and impleaded the defendant thereon upon and for the not performing of the very same identical promises in the said declaration in this suit above mentioned, [*as by the record^b and proceedings thereof remaining in the said last mentioned court appears,*] and the defendant further saith, that the parties in this and the said former suit are the same parties, and that the said former suit is still depending in the said [*last mentioned*] court, and this the defendant is ready to verify;^c wherefore he prays judgment of the said writ and declaration in this suit, and that the same may be quashed, &c. [*Counsel's signature and affidavit of truth, as ante, p. 649.*]

SEC. XI. ANOTHER FORM OF PLEA IN ABATEMENT OF THE PENDENCY OF ANOTHER ACTION.^d

*Proceed as in the preceding form to the asterisk * and then as follows:*]
 That the said plaintiff heretofore, to wit, at a court of common pleas held at

(a) The law on this subject will be found in Com. Dig. Abatement, H. 24; Bac. Ab. Abatement, M. In answer to the above plea, the plaintiff may deny the former suit, or new assign that he is suing upon a different cause of action; see *Colson v. Selby*, 1 Esp. R. 452. The commencement of another suit for the same cause of action in a court of another state, since the last continuance, cannot be pleaded in abatement of the original suit; and if the matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory. A subsequent suit may be abated by an allegation of the pendency of a prior suit, but the converse does not hold in personal actions. 1 Whea. 215; 9 Johns. 221; 12 Johns. 99; 8 Mass. 456; 10 Pick. 470.

(b) This averment, if traversed, is satisfied by

producing a record of a writ only; *Kerby v. Sigers*, 2 Dowl. P. C. 669; cited 1 Chit. Prac.

(c) Where matter of record of this country is pleaded, the plea should conclude with a verification “by the record;” 5 East. 473; but where, as in the above plea, a matter of record is pleaded, with facts also, properly referable to a jury, and such matter of record and facts, conjointly, constitute the parties’ case, the verification should not be by the record. Com. Dig. Pl. E. 29, 32; 15 Eng. C. L. Rep. 28.

Where a domestic record is put in issue by the plea, the question is tried by the court; and the judgment of a court of record of a sister State of the Union, is considered, for this purpose, as a domestic judgment. 6 Pick. 227; 1 Dev. & Bat. 362; 1 Greenl. Ev. 547, n. An issue upon a foreign record is tried by a jury.

(d) Wilcox’s Prac. 40.

Infancy of Plaintiff—Abatement and Bar.

—, within and for the county of —, on —, impleaded the defendant in a plea of *assumpsit*, and for the same cause of action in the declaration aforesaid mentioned, as by the record thereof in the same court remaining, appears; and that the parties aforesaid, to and in the plea aforesaid, in the said court of —, and the said A. B., the now plaintiff here, and the said C. D., the now defendant here, are the same persons, and not other or different; and that the plea aforesaid, in said court of —, yet remains undetermined,* wherefore, [*&c.*, concluding as in preceding form.]

SEC. XII. INFANCY OF PLAINTIFF.

C. D. }
 ads. } ——— Common Pleas.
 A. B. }

And the said C. D., defendant in this suit, by G. H., his attorney, comes and defends the wrong and injury, when, &c., and prays judgment of the said writ and declaration, because, he says, that the said plaintiff is an infant under the age of twenty-one years, to wit, of the age of [nineteen] years, to wit, at —, in the county aforesaid, [*the venue*,] and this he is ready to verify; wherefore, inasmuch as the said plaintiff hath sued therein in his own person, and not by his next friend, the said defendant prays judgment of the said writ and declaration, &c., and that the same may be quashed.

G. H., Attorney for defendant.

[*Add affidavit, ante, 649.*]

SEC. XIII. PLEA IN ABATEMENT AS TO PART (COVERTURE) AND IN BAR (GENERAL ISSUE AND COVERTURE, IN ASSUMPSIT) AS TO THE REST.

C. D. }
 ads. } ——— Common Pleas.
 A. B. }

And the said defendant, in her own person, comes and defends the wrong and injury, when, &c., and as to the said [first and second] counts of the said declaration, says that she did not undertake or promise in manner and form as the said plaintiff hath above complained against her. And of this she puts herself upon the country, &c.

And for a further plea in this behalf, as to the said first and second counts of the said declaration, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against her, because, she says, that she, the said defendant, before and at the time of the making of the said several

(a) The averment of the pendency of the suit 1 Mass. 495; 3 Rawle, 320; 1 Johns. Ca. 397; at the time of the plea pleaded seems necessary; 1 Ld. Ray. 274; 2 Ld. Ray. 1014; 1 Salk. 329.

Replication by way of Estoppel.

supposed promises and undertakings, in the said [first and second] counts mentioned, and before, and at the time the said supposed causes of action therein mentioned did accrue, was, and still is the wife of T. J., who is still living, to wit, at, [&c., *the venue.*] And this she is ready to verify; wherefore she prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against her, &c.

And as to so much and such part of the said declaration of the said plaintiff, as relates to the said several supposed promises and undertakings in the said [third and subsequent] counts mentioned; and, as to those counts, the said defendant prays judgment of that part of the said declaration which relates to the said last mentioned supposed promises and undertakings, and of the said [third and subsequent] counts, and that they may be respectively quashed; because, she says, that at the time of the commencement of the suit of the said plaintiff in this behalf, she was, and still is, married to the said T. J., who is still living, to wit, at, [&c., *the venue,*] aforesaid, and this she is ready to verify: wherefore, because the said T. J. is not named in the said writ and declaration in this behalf, she prays judgment of so much and such part of the said writ and declaration as relates to the said supposed promises and undertakings in the said [third and subsequent] counts mentioned; and also of the said [third and subsequent] counts, and that the same may in this behalf be quashed, &c. [*Add affidavit, ante, p. 649.*]

SEC. XIV. REPLICATION BY WAY OF ESTOPPEL TO PLEA IN ABATEMENT, OF COVERTURE.

A. B. }
v. } — Common Pleas.
C. D. }

And the said plaintiff saith, that the said person against whom he, the said plaintiff, hath exhibited his said writ and declaration, by the name of C. D., ought not to be admitted or received to plead the plea by him above pleaded, for quashing the said writ and declaration of the said plaintiff; because, he saith, that the said person against whom he, the said plaintiff, hath exhibited his said writ and declaration, by the name of C. D., heretofore, to wit, in the term of [January] last past, came into this court here, and put in bail at the suit of the said plaintiff, in the plea aforesaid, by the name of C. D., as by the record thereof, remaining in the said court, before the judges thereof, at — aforesaid, more fully appears; and this he, the said plaintiff, is ready to verify by that record; wherefore he prays judgment, if the said person against whom he, the said plaintiff, hath exhibited his said writ and declaration, by the name of C. D., ought to be admitted or received to his said plea for quashing the said writ and declaration, contrary to his own acknowledgment, and the said record, &c., and that he may answer over to the said writ and declaration.

E. F., Plaintiff's Attorney.

CHAPTER V.

PLEAS, REPLICATIONS, &c., IN ASSUMPSIT.

SECTION I. GENERAL ISSUE.

1. General issue, with notice of set off and other special matter, and affidavit.
2. General issue in case of several defendants.
3. The like to part of a declaration.

II. ACCORD AND SATISFACTION, &c.

4. Accord and satisfaction after breach by delivery of goods.
5. Replication that defendant did not deliver in satisfaction.
6. Plea that note sued on has been satisfied by work, and the sale and delivery of goods, and the loan of moneys under an agreement to that effect.
7. Plea that a bond has been taken in satisfaction.
8. Plea that at the time the plaintiff became liable for the money as defendant's surety, the defendant deposited goods with the plaintiff with a power of sale, and that plaintiff sold the same in satisfaction of the demand.
9. Plea that the defendant was indebted to the plaintiff and to one T. W., and at their request he gave them jointly a warrant of attorney for their debt in full satisfaction.
10. Plea to a declaration to recover an annual sum, that it was agreed between plaintiff and defendant that defendant should retain thereout enough to pay a debt due to himself from a third person, and against whom he should not take proceedings.
11. Plea that a debt due from the plaintiff and a third person to the defendant, should be set off against the debt sought to be recovered, the defendant paying the difference.
12. Plea that the plaintiff and a third person had mutual accounts, and that it was agreed between them and defendant, that the debt of the latter should be credited to the plaintiff in his account with the third party, who should be paid by the defendant.

13. Plea that the debt has been extinguished by an agreement between the plaintiff and the defendant and a third person, who was the defendant's debtor, that the plaintiff should accept such third person as his debtor, in lieu and in discharge of defendant.
14. Plea that the plaintiff and the defendant's other creditors agreed to take a composition on defendant's debts in full discharge of their claims, &c.
15. Plea that the plaintiff and other creditors of the defendant agreed to take a composition on their debts payable by installments—that plaintiff discharged defendant from tendering the composition at the stipulated times—and tender thereof before action.
16. Replication thereto denying the agreement.
17. Plea that the defendant accepted a bill of exchange not yet due on account of the debt.
18. Replication thereto—denial that the plaintiff took the bill.
19. Replication (to a plea that the defendant accepted a bill on account,) that the bill was dishonored when due.
20. Plea that the defendant accepted a bill, not due, in payment of the debt, and for the plaintiff's accommodation, and delivered it to the plaintiff without a drawer's name attached thereto.
21. Plea that the defendant indorsed a bill to the plaintiff on account of the debt.
22. Plea that the defendant indorsed to the plaintiff, on account, a bill upon a third person, and was discharged by laches, &c.

III. ADMINISTRATOR.

23. Plea of the general issue.
24. That the defendant is not administrator.
25. Plea that defendant was appointed administrator and gave notice thereof; and that the plaintiff did not, within four years, commence his suit, &c.

IV. ARBITRAMENT AND AWARD.

26. Plea of arbitrament and award (without performance) to a declaration upon a contract to recover general damages.
27. Replication thereto.

V. BANKRUPTCY.

28. Plea of discharge under bankrupt act.
29. Another form.

VI. CORPORATION.

30. Plea of null corporation.
31. Replication thereto.

VII. COVERTURE.

32. Plea of defendant's coverture when the contract was made.

33. Replication thereto—denial of the marriage.

VIII. CROPS.

34. Plea to a declaration in assumpsit by an outgoing landlord against his incoming tenant, to recover the amount of a valuation of crops and tillages, &c., bought with a lease—that the contract was void for the want of writing under the statute of frauds.

IX. DE INJURIA.

35. Replication de injuria sua propria absque tali causa in assumpsit or debt.

X. ESTOPPEL.

36. Plea in Estoppel.

37. Replication by way of estoppel.

XI. EXECUTORS.

38. Non-assumpsit by executors.

39. Plea that the defendant is not executor.

40. Plene administravit.

41. Replication that defendant had assets.

XII. FRAUD, STATUTE OF.

42. Plea that the promise was not in writing, &c.

XIII. HUSBAND AND WIFE.

43. General issue to a declaration against husband and wife for her debt dum sola.

XIV. INFANCY.

44. Plea of infancy of defendant.

45. Replication—denial of defendant's infancy.

46. Replication—that the action is partly for necessities and nolle prosequi as to the remainder of the demand.

47. Rejoinder—that the goods, &c., were not necessities.

48. To a plea of infancy, that the defendant confirmed his promise after he became of age.

49. Rejoinder—denying that the promise was confirmed.

XV. JUDGMENT.

50. Plea of judgment recovered for the debt.

51. Replication of nul tiel record to plea of judgment recovered in the same court.

52. Replication of nul tiel record to plea of judgment recovered in another court.

XVI. LIMITATIONS, STATUTE OF.

53. Plea of the statute of Limitations.

54. Replication — that the cause of action accrued within six years.
55. Replication — that the defendant left this State and remained out of the State when the cause of action accrued, and was sued within six years next after his return.
56. Replication — that the defendant resided out of the State at the time the cause of action accrued, and that the plaintiff sued within six years next after his return.
57. Replication — that the defendant removed to a place unknown to the plaintiff, and that the plaintiff sued within six years next after his place of residence became known.

XVII. PAYMENT.

58. Plea of payment before action to part of the plaintiff's claim.
59. Plea of payment before action of the whole of plaintiff's claim.
60. Plea to a declaration containing an indebitatus count, and an account stated; that the debts stated in these counts are one and the same sum, and payment of that sum.
61. Replication denying the payments in satisfaction.
62. Plea of payment of debt and costs to the plaintiff after suit brought in satisfaction.
63. Plea of payment into court.
64. Replication to a plea of payment into court — that plaintiff accepts the same in satisfaction.
65. Replication to a plea of payment of money into court — that plaintiff claims a further sum.

XVIII. RELEASE.

66. Plea of Release.
67. Replication that the release was obtained by fraud.
68. Rejoinder that the release was fairly obtained.

XIX. TENDER.

69. Non assumpsit, &c., except as to part, and a tender of that sum.
70. Replication thereto denying the tender.
71. Replication — a demand of the debt before the tender.
72. Replication to a plea of tender of part of a bill of exchange — showing a prior demand of the amount of the bill.
73. Replication — of a demand of the sum tendered after the tender.

General Issue.

XX. USURY.

74. Plea that a bill of exchange was discounted by a Bank for a greater rate of interest than six per cent.
75. Plea Puis darrien continuance.

SEC. I. GENERAL ISSUES.

1. *General issue,* with notice of set off, and other special matter, and affidavit.*

C. D. }
 ads. } — Common Pleas.
 A. B. }

And the said C. D. comes and defends, &c.,* and says, that he did not promise, [*if an administrator, say: the said E. F., (the intestate,) did not*

(a) The general issue in assumpsit, and other actions, have derived their names from the emphatic language of denial contained in them, when framed in the old law language. Thus, the general issue in assumpsit is called "non assumpsit," (he did not undertake;) in debt it is called "nil debit," (he owes nothing;) in debt on specialty and in covenant, it is "non est factum," (it is not his deed;) in replevin, "non cepit," (he did not take.)

In trespass case and trover, the general issue is called a plea of not guilty, (non culpabilis.)

In assumpsit, if the defendant insists that no such contract was in fact made, or that it was originally void, and that the plaintiff never had a cause of action, he must plead the general issue, non assumpsit; 1 Chitt. Pl. 511.

Under this plea, he may give in evidence nearly every defence which shows that *there was not a subsisting cause of action at the time the suit was brought*; 2 Hill. Rep. 478, such as coverture, 2 Stra. 1104; 5 Co. 119; 1 Tidd's Pr. 646; duress, 5 Co. 119; infancy, 1 Salk. 279; the statute of gaming, 1 Ld. Raym. 87; payment, 12 Ohio Rep. 120, or its equivalent; 12 Wend. 470; performance of the contract, 13 Johns. Rep. 56; accord and satisfaction, 2 Johns. Rep. 346; 2 Wend. Rep. 486; arbitrament and award, 4 Esp. Rep. 181; 1 Chitt. Pl. 478, a release; *id. ib.*, that another ought to have been made co-plaintiff—the defendant's incapacity to contract, as that he was insane, or drunk, when the contract was made; but the defendant's coverture after the contract was

made, must be pleaded in abatement. So an alteration in the terms of the contract, non performance of a condition precedent, or that it became illegal or impossible to be performed, or that the plaintiff is a bankrupt, or that a higher security has been taken. So, every where, perhaps, except in Ohio, former recovery for the same cause may be given in evidence under the general issue; 17 Johns. Rep. 284; 1 Harr. & Gill, 492; 8 Wend. 1; 2 Stra. 733; 1 Saund. 92, n. 2.; 3 East. 345; 3 Wils. 304; but see 3 Ohio Rep. 271.

Bankruptcy of the defendant, (Bankrupt Act U. S., of Aug. 19, 1841, Sec. 4,) tender, and the statute of limitations, must be pleaded specially; 1 Saund. 83; 1 Ld. Raym. 153; 17 Wend. 557; 2 Hill, (N. Y.) 478.

Although a total failure of consideration may be given in evidence under the general issue, (15 Johns. Rep. 230; 12 Wend. 246; 13 id. 605,) it seems that when the defence is a *partial* failure of the consideration of a note, it cannot be given in evidence in New York without notice; 13 Wend. 605; 12 id. 246; the defence in such case only going to mitigate the damages; 6 Cowen, 59; 12 Wend. 246. And yet in this and in all other actions, a partial defence cannot be pleaded, and must be given in evidence under the general issue; 2 Hill, 194; 5 Hill, 393; 3 Bl. Com. 305.

If the defendant admits that the plaintiff once had a cause of action, but insists that it has since been discharged by payment, release, discharge, performance, or otherwise, he may ei-

Notice of Set Off and Special Matter.

promise,] as in the declaration alleged; [or, in manner and form as the plaintiff hath above thereof complained against him;] and of this he puts himself upon the country. And the plaintiff doth the like.*

By S. S., Attorney for Defendant.

Notice of set off,^b and other special matter.^c

The plaintiff will also take notice, that the defendant on the trial of this cause, will give in evidence that the plaintiff at the commencement of this suit,

ther plead the general issue, and give the matter in evidence, as above stated, or he may plead it specially, at his election; 1 Chitt. Pl. 515. So, infancy, coverture of the defendant, or of a third person, whose debt the defendant undertook to pay, or duress, or illegality in the consideration, or that the contract was void under the statute of frauds, or accord and satisfaction, may be pleaded specially, or given in evidence under the general issue.

If payment be made after issue joined, it must be pleaded *puis-darrein continuance*; 2 Hill, (N. Y.) 293.

If there be a set off, notice thereof should be given with the general issue, otherwise it cannot be given in evidence.

A plea of nil debit, in *assumpsit*, is, it seems, a nullity; Tidd's Pr. 363, 476.

(a) The common *similitur*, which may be added by either party, is frequently omitted; and its omission could not, probably, be taken advantage of even by special demurrer.

(b) As to set off, the statute provides, (Swan's Stat. 850, Sec. 1 and 3,) "that in all actions and suits brought on any specialty, contract, bill, note, promise or account, in any court in this State, it shall be lawful for the defendant to plead the general issue, and at the same time to give notice, in writing, to the plaintiff or his attorney, of any debt, contract, book account, or other liquidated demands against the plaintiff, which he may be desirous to have set off and allowed to him, in such action or suit, or of any payment or payments he may have made on such specialty, contract, bill, note, promise or account; and the court shall render judgment for the party, whether plaintiff or defendant, in whose favor the balance may be found, for the amount of such balance and costs: provided, always, that no bond, bill,

note or other writing, assigned over to the defendant after the suit is commenced against him, shall be allowed to be brought in by way of set off to such suit.

"That when any plaintiff or plaintiffs, shall be indebted to any defendant or defendants, in any debt, contract, book account, or other liquidated demand, and the defendant shall fail to plead the general issue, and give in evidence the said debt, contract, book account, or other liquidated demand, as aforesaid, agreeably to the provisions of this act, said defendant or defendants shall forever be barred from recovering any costs upon any suit which may thereafter be instituted upon the said debt, contract, book account or other liquidated demand, as aforesaid, unless it shall appear to the court, that it was not in the power of the defendant, in the former suit, to produce the evidence of his said debt, contract, book account or other liquidated demand, as aforesaid, at the time of trial."

Set off cannot be pleaded; 16 Ohio Rep. 457.

In covenant, unliquidated damages, arising out of a breach of contract, cannot be set off; 8 Ohio Rep. 169.

In a civil action by the State, the defendant may set off a debt due to him from the State; 10 Ohio Rep. 91; but see 18 Ohio Rep. —.

In an action by a surviving dormant partner, the defendant may set off a debt due from the firm; 10 Ohio Rep. 455.

When one dies with the statute of limitations running in his favor, his death does not stop it, and the debt when once thus barred, cannot be set off against his administrator; 6 Ohio Rep. 35; and as to set off generally against an administrator, see same case.

(c) The statute provides, (Swan's Stat. 661, Sec. 64,) "that it shall be lawful for the defendant in any action, to plead the general issue, and give any special matter in evidence, which, if

Affidavit denying Signature.

was, and still is, indebted to the defendant in the sum of — dollars, for the price and value of goods, before that time bargained and sold by the defendant to the plaintiff at his request; and also in the sum of — dollars, for the price and value of work, before that time done, and materials for the same provided, by the defendant for the plaintiff at his request; and in the sum of — dollars, for money before that time lent by the defendant to the plaintiff at his request; and also in the sum of — dollars, for money before that time received by the plaintiff for the use of the defendant; and in the sum of — dollars, for money found to be due from the plaintiff to the defendant, on an account before that time stated between them; and also that the defendant will set off on said trial, so much of the said several sums of money so due and owing from the plaintiff to the defendant, against any demand of the plaintiff, to be proved on the said trial, as will be sufficient to satisfy such demand; and will also then and there demand a judgment against the plaintiff for the balance of said several sums of money due the defendant, according to the statute in such case made and provided.

[If the defendant has any other matter of defence, except set off, which he desires to include in the notice, add the same thus:] And the plaintiff will further notice that the defendant will give in evidence on the trial of the above cause, in bar of the plaintiff's action, that, [&c., here setting forth the special matter.]

J. S., Attorney for Defendant.

Affidavit when a person denies his signature as the maker, drawer, indorser or acceptor of a Bill of Exchange, or Promissory Note.

The State of Ohio, ——— county, ss.:

I, C. D., the defendant in the above mentioned cause, do make solemn

pleaded, would be a bar to such action, giving notice, with the same plea, of the matter or matters, so intended to be given in evidence."

A notice of special matter, though not required to be as full and technical as a special plea, must contain all the facts necessary to sustain a special plea. If the notice be so inartificially drawn that it would be liable to a general demurrer, were it in the shape of a plea, then it is bad as a notice, and if objected to, would be either set aside, or the court would refuse to permit the defendant to give any evidence under it; 13 Johns. 475; 5 Ohio Rep. 169, 346; 13 do. 21. A defective notice cannot, however, be demurred to; 8 Ohio Rep. 405.

Facts set out in the notice cannot be used by the plaintiff as evidence in the case; 8 Ohio Rep. 405.

Matters arising after plea filed, cannot be ta-

ken advantage of by notice under the general issue, but must be pleaded puis darrein continuance; 10 Ohio Rep. 300.

It is of course unnecessary to give notice of any special matter which can be given in evidence under the general issue; and on the other hand, it will be of no use whatever to the defendant, to give notice of any matter which, if pleaded, would not be a complete answer and bar to the declaration, or some one count of the declaration; 5 Ohio Rep. 169, 340; so that, if the defendant gives notice of matter which would not, if pleaded, bar the action or a count, and which, in the absence of the notice, could not be given in evidence under the general issue, the court will not, on the trial, permit any proof whatever to be given of such matter.

(a) As to an affidavit to the truth of a plea, and the object thereof, the statute provides,

Affidavit denying Signature.

oath that I did not [make, or, say "draw," or, say "indorse," or, say "accept," according to the nature of the obligation of the defendant as stated in the declaration,] the said promissory note [or, bill of exchange] mentioned and described in the declaration of the plaintiff in this cause; and that the above plea of non assumpsit, and the matters therein contained, are true in substance and in fact.

[Signed]

C. D.

Sworn to and subscribed before me, this, [&c.]

[Annex the affidavit to the plea of the general issue.]

Affidavit when a person is sued upon a Bill of Exchange or Promissory Note, and denies the signature of another party to it.

The State of Ohio, ——— county, ss. : •

I, C. D., the defendant in the above mentioned cause, do make solemn oath that I verily believe that the promissory note [or, bill of exchange, as the case may be,] mentioned and described in the declaration filed in this cause, as having been made and subscribed, [or, say indorsed] by G. H., was not in truth and in fact subscribed [or, say indorsed] by the said G. H., who is charged in this suit as the maker [or, say indorser] thereof, [and if the fact be so, add:] and that the said promissory note [or, bill of exchange] was not indorsed by any person, purporting to be a prior indorser thereof.

[Signed]

C. D.

Sworn to and subscribed, this, [&c.]

(Swan's Stat. 325,) as follows: "That upon plea of non est factum, offered by the person charged as the obligor or grantor of a deed, or plea of non assumpsit, or nil debit, offered by the person charged as the maker or indorser of any promissory note, or drawer, indorser or acceptor of any bill of exchange, it shall not be necessary for the plaintiff to prove the execution of the deed, the making of the note, or the drawing or accepting of the bill of exchange, upon which such suit is brought, or any indorsement thereon, unless the party offering such plea, shall make affidavit of the truth thereof, or that any such indorsement was not made as it purports to have been; and when any person, other

than the grantor or obligator of such deed, or maker or indorser of such promissory note, or drawer, indorser or acceptor of such bill of exchange, shall be defendant, the same rule shall be observed as to proof, unless the defendant, at the time when either of the pleas aforesaid shall be offered, shall make affidavit that he or she believes the deed, on which the action is founded, is not the deed of the party charged as the obligor or grantor thereof; or that the promissory note or bill of exchange was not subscribed or indorsed by the party charged as the maker or indorser thereof, or not indorsed by any person purporting to be a prior indorser thereof."

General issue as to Part of Declaration.

2. *The like in case of several Defendants.*

C. D. and E. F.^a }
 ats. }
 A. B. } ——— Common Pleas. In Assumpsit.

The said defendants, by J. S., their attorney, come and defend, &c., and say that they did not promise as in the declaration alleged; and of this the defendants put themselves upon the country, &c.; and the plaintiff doth the like, &c.

J. S., Attorney for Defendants.

3. *The like to part of a Declaration.*

*Title and commencement as in No. 1, to the *, and then as follows :*

As to the said [first] count of the said declaration, [or, "as to the said promise, so far as it relates to the sum of — dollars, parcel of the said sum of — dollars in the said — count of the declaration mentioned,"] and says that he did not promise as in the declaration is in that behalf alleged; and of this the defendant puts himself upon the country, &c.

¶ (a) When one only of the defendants pleads, (the others not being found,) the plea would be thus:

—— Common Pleas.

C. D. impleaded with
 E. F., [and others,] }
 ats. } In Assumpsit.
 A. B. }

And the said C. D., impleaded, &c., comes and defends, &c., and says that he, the said C. D. and the said E. F., [naming the other defendants,] defendants in this suit, did not promise as in the declaration alleged, and of this the said C. D. puts himself upon the country; and the plaintiff doth the like.

J. S., Att'y for C. D.

It will be observed that the commencement of this plea shows which of the defendants interposed the plea—that the body of the plea takes issue upon and denies the promise of *all* the defendants, and concludes by C. D. only, putting himself upon the country.

And, in general, when a separate plea is filed by one of two or more defendants in an action of assumpsit, debt, or covenant, the commencement and conclusion of the plea are in the name of, and are the exclusive allegation of the de-

fendant who pleads; but the body of the plea, which shows the subject matter of the defence, must conform to the nature of the declaration, which avers a joint liability, and therefore the body of the plea must show a bar to the action as against all the defendants. In a suit against the joint makers of a note or bill, their separate pleas must go to the discharge of both, although sued jointly with the indorsers under the statutes; (42 Vol. Stat. 72; 43 do. 67;) for, the statutes relates only to separate defences as between maker and indorser.

When, however, the separate plea sets up matter of personal exemption, [or, discharge,] such as [a plea of] infancy, coverture, or bankruptcy of one of the defendants, (and which should be separately pleaded, see ante, p. 640, note,) it would not be a bar of the action as to all, and need not go to the discharge of all. See ante, p. 75.

So, in actions *ex delicto* against two or more, although the declaration avers a grievance committed jointly by all, yet in general, one or more may be acquitted, and a verdict found in favor of the plaintiff against the others, and each may therefore plead separately a distinct defence, and so state it in the body of the plea.

Accord and Satisfaction, &c.

SPECIAL PLEAS.*

ACCORD AND SATISFACTION.

4. *Plea of Accord and Satisfaction after breach, by delivery of Goods.*

C. D. }
 ats. } ——— Common Pleas. In Assumpsit.
 A. B. }

And the said C. D., defendant in this suit, by N. W., his attorney, comes and defends the wrong and injury, when, &c., and says that the said plaintiff ought not to maintain his aforesaid action thereof against him, because he* says that after the making of the said promises in the said declaration mentioned, and before^b the commencement of this suit, to wit, on [&c..] at [&c..] he delivered to the plaintiff, and the plaintiff then and there accepted and received, of and from the defendant, certain goods, to wit, — of great value,^c in full satisfaction and discharge of the several promises [*or, in debt*, of the debts and moneys] in the declaration mentioned, and of all the damages by the plaintiff sustained by reason of the non-performance thereof, [*or, in debt*, by reason of the non-payment thereof;] and this the defendant is ready to verify, &c.; wherefore he prays payment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

N. W., Attorney for Defendant.

(a) The general requisites of a special plea, conflict with this rule; Steph. Pl. 251, 271, 265; 20 Johns. Rep. 404; 7 Cowen, 450.

1. It must be adapted to the nature and form of the action, and also be conformable to the count or declaration.

2. It must answer all that it assumes to answer, and no more; 17 Wend. 188; 18 Johns. Rep. 28; 20 id. 205; 19 id. 349; 6 Ohio Rep. 99.

3. It must deny, or confess and avoid the allegations of the count or declaration which it assumes to answer; 4 Man. & Gr. 126; 6 Ohio Rep. 99.

4. It must be single, that is, it must not contain several *distinct answers* to the same matter. But the statement of several distinct facts constituting one distinct answer to the same matter, or the statement of several distinct points or matters, essential to make one defence, does not

5. It must be certain; 19 Johns. Rep. 349; 6 Ohio Rep. 99; 9 Ohio Rep. 136.

6. It must be direct and positive, and not argumentative.

7. It must be capable of trial.

8. It must be true.

If a plea is bad in part, it is bad for the whole; 2 Wend. 451.

(b) If the accord and satisfaction were *after* writ, the plea should be altered accordingly; see *post*, "payment after action."

(c) "It is not required that the chattels should be of equal value" (with the debt,) "for the party receiving it is always taken to be the best judge of that in matters of uncertain value; Dyer 72, a.;" Per Deaman, C. J.; Thompson v. Percival, 5 B. & Ad. 332; 3 N. & M. 167, S. C.

5. *Replication that Defendant did not deliver in satisfaction.*

A. B. }
 v. } ——— Common Pleas. In Assumpsit.
 C. D. }

And the said plaintiff, as to the said plea of the said defendant by him [secondly] above pleaded, says that the said plaintiff, by reason of any thing by said defendant in that plea alleged, ought not to be barred from maintaining his aforesaid action thereof against the defendant,* because he says [*or, if the plea be to part, see ante, p. 642,*] that the defendant did not deliver the said [horse] to him, the plaintiff, in full satisfaction and discharge of the said promises [*or, debts and moneys, if in debt,*] in the said declaration mentioned, and of the damages by the plaintiff sustained by reason of the non-performance thereof, [*or, in debt, non-payment thereof,*] in manner and form as the defendant hath in his said plea [*or, — plea,*] alleged; and this the plaintiff prays may be inquired of by the country, &c.; and the defendant doth the like, &c.

G. H., Attorney for Plaintiff.

6. *Plea that the Note sued on has been satisfied by Work, and the Sale and Delivery of Goods and the loan of Moneys by the Defendant to the Plaintiff, under an agreement to that effect^b*

*Title and commencement as in No. 4, to the *, and then as follows:* says that before the commencement of this suit, to wit, on the — day of —, A. D. —, at, [&c.] it was agreed by and between the plaintiff and the defendant, that the defendant should do and perform work, and find and provide materials for the same for the plaintiff; and should sell and deliver goods and chattels to the plaintiff, and lend and advance moneys to him from time to time, to the extent, and value, and amount, and in full satisfaction, payment and discharge of the principal, and interest then due, and the interest thereafter to become due, upon the said promissory note in the first count mentioned, until the said note should be thereby fully paid off and satisfied; and the plaintiff then and there agreed to accept such work and materials so to be done and provided, and goods and chattels so to be sold and delivered, and moneys so to be lent, to the extent, value and amount of the principal and interest then due, and the interest thereafter to become due, upon the said note, until the same should be fully paid off and satisfied, in full satisfaction, payment and

(a) *Or the replication may be that, "plaintiff did not accept the said horse from the defendant in full," &c. A traverse "that defendant did not deliver, nor did plaintiff receive," was held good on demurrer.*

(b) *The replication may deny the agreement, or the performance of it "in satisfaction;" concluding to the country.*

Accord and Satisfaction, &c.

discharge of the principal and interest then due, and the interest thereafter to become due, upon the said note; and the defendant avers, that in pursuance of the said agreement, he, the said defendant, did, at the plaintiff's request, from time to time, after the making of the said agreement, and before the commencement of this suit, to wit, on the — day of —, A. D. —, at said county, on divers days and times after that day and before the — day of —, A. D. —, do and perform work, and find and provide materials for the same, for the plaintiff, and sell and deliver goods and chattels to the plaintiff, and lend and advance moneys to him, to the extent, and value, and amount, and in full satisfaction and discharge of all the principal money and interest which at the time of the said agreement were due, and the interest which afterwards became due, upon the said note, until afterwards and before the commencement of this suit, to wit, on the day and year last aforesaid, when the said note was thereby fully paid off and satisfied; and the plaintiff then and there accepted said work and materials, goods and chattels, and moneys so lent, to the extent, value, and amount last aforesaid, in full payment, satisfaction and discharge of the said principal money and interest, and of the said supposed cause of action in the first count mentioned; and this the defendant is ready to verify, &c.; wherefore, [*&c., conclude as ante, No. 4.*]

7. *That a Bond has been taken in satisfaction.*

And for a further plea as to the sum of — dollars, parcel, [*&c.*,] the defendant says that the plaintiff ought not to maintain his aforesaid action thereof against him, because he says that he, the defendant, after the making of the said supposed promises in the said declaration mentioned, and before the commencement of this suit, to wit, on, [*&c.*] at said county of —, made and sealed, and as his act and deed, delivered to the plaintiff a certain writing obligatory, in the penal sum of — dollars, conditioned for the payment by the defendant to the plaintiff, of the said sum of — dollars, parcel, &c., and interest for the same, on, [*&c.*] which said writing obligatory the defendant then and there delivered to the plaintiff, and the plaintiff then and there accepted and received the same of and from the defendant in full satisfaction and discharge, [*&c., as in next form and prayer of judgment.*]

8. *Plea to a Declaration for money paid for Defendant's use, that at the time Plaintiff became liable for the money as Defendant's surety, the Defendant deposited Goods with the Plaintiff with a Power of Sale, and that Plaintiff sold the same in satisfaction of the demand.*

And as to the sum of one hundred dollars, parcel of the said first mentioned sum of two hundred dollars, the defendant saith that the plaintiff ought not to

Accord and Satisfaction, &c.

maintain his aforesaid action thereof against him, because he saith that the plaintiff, before the making of the said promise as to the said sum of one hundred dollars, parcel, &c., to wit, on, [*&c.*] at, [*&c.*] became surety and liable for the defendant, at his request, to a certain person, to wit, one E. F., for the said sum of one hundred dollars, parcel, &c.; and the defendant further saith, that at the time the plaintiff so became surety and liable for the defendant, to wit, on the day and year last aforesaid, at the county aforesaid, the defendant deposited with the plaintiff, and he received of the defendant, certain goods of the defendant, to wit, —, of great value, that is to say, one hundred dollars; and it was then and there agreed between them, that in case the plaintiff should be obliged to pay the said debt or sum of one hundred dollars, for the defendant, he, the plaintiff, should be at liberty to sell such goods, and apply the proceeds thereof to the extent of such debt, in satisfaction of the money he should have so paid for the defendant; and the defendant avers that the plaintiff, as such surety, afterwards, and before the commencement of this suit, to wit, on, [*&c.*] at, [*&c.*] paid the said debt, to wit, the said sum of one hundred dollars, parcel, &c., for the defendant, as in the declaration alleged, and then and there, by virtue of the said agreement, sold the said goods, and applied the proceeds thereof, to wit, the sum of one hundred dollars, then and there received by him upon such sale, as and for such proceeds, the same being sufficient in that behalf, in full satisfaction and discharge of the said sum of one hundred dollars, parcel, &c., and of the defendant's said promise in respect thereof, and of all his, the plaintiff's damages, on occasion of the non performance of such promise: and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action thereof against him, &c.

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9. *Plea that the Defendant was indebted to Plaintiff and to one T. W., and at their request he gave them, jointly, a Warrant of Attorney for their debts, in full satisfaction.*

And for a further plea as to the sum of six hundred and twenty dollars, parcel of the moneys in the declaration mentioned, the defendant saith that the plaintiff ought not to maintain his action thereof against him, because he saith that after the making of the said promise in the declaration mentioned as to the said sum of six hundred and twenty dollars, parcel, &c., and whilst the defendant was indebted to the plaintiff in the said sum of six hundred and twenty dollars, parcel, &c., to wit, on, [*&c.*] at, [*&c.*] he, the defendant, was also indebted to one T. W., in the sum of two thousand three hundred and eighty dollars, making together the sum of three thousand dollars; and the defendant being so indebted to the said plaintiff, and the said T. W., respectively, heretofore and before the commencement of this suit, to wit, on the day and year last aforesaid, at, [*&c.*] at the request of the

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plaintiff and the said T. W., signed, sealed, and as his act and deed, delivered to them, a certain instrument called a warrant of attorney to confess judgment, bearing date on, [*&c.*,] last aforesaid, directed to certain persons therein named, as, and then being attorneys of courts of record of the State of Ohio, and thereby empowered them, or any of them, or any other attorney as aforesaid, to appear for him, the defendant, in said courts at any time after the — day of —, and [*reciting the warrant of attorney as thus:*] receive a declaration against him, the defendant, at the suit of the plaintiff and T. W., in a plea of debt, for six thousand dollars: of which sum of six thousand dollars, the said sum of six hundred and twenty dollars so due and owing from the said defendant to the said plaintiff, was part and parcel, and to suffer judgment to go against him in such suit for the said sum of six thousand dollars, by default or otherwise, [*reciting the warrant of attorney,*] which said warrant of attorney was and is subject to a defeazance thereunder written, whereby it was declared that the said warrant of attorney was given to secure the payment of the said sum of six hundred and twenty dollars to the plaintiff, and the said sum of two thousand three hundred and eighty dollars to the said T. W., in manner following, that is to say, [*setting out the defeazance,*] and the defendant then and there, at the request of them, the said plaintiff and T. W., delivered to them the said warrant of attorney so executed by him, the said defendant, as aforesaid, in full satisfaction and discharge of the said sum of money so then due and owing to them, the said plaintiff and T. W., respectively, as aforesaid, and which said warrant of attorney they, the said plaintiff and T. W.; then and there accepted and received of, and from the defendant, in full satisfaction and discharge of the said several sums of money so then due and owing from the said defendant to the said plaintiff and T. W., respectively, as aforesaid; and the said defendant further saith, that the said instrument called a warrant of attorney to confess judgment, so being executed, delivered and accepted in manner, and on the occasion aforesaid, they, the plaintiff and the said T. W., afterwards, to wit, on, [*&c.*,] at, [*&c.*,] caused the said judgment to be entered up of record in the Court of Common Pleas of — county, Ohio, on the — day of —, against the defendant, in the year last aforesaid, for the said sum of six thousand dollars, as also for — dollars — cents, which were awarded to the said plaintiff and T. W., in and by the said court, for their damages by them sustained, on occasion of the detention of the said debt, and for — dollars — cents for their costs and charges by them about their suit in that behalf expended, as by the record and proceedings thereof still remaining in the said court, more fully appears; and the defendant further saith, that the said judgment still remains in full force and effect, not reversed or any way made void, and this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action thereof against him, &c.

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10. *Plea to a Declaration in Assumpsit to recover an annual sum, that it was agreed between Plaintiff and Defendant that Defendant should retain thereof enough to pay a debt due to himself from a third person, and against whom he should not take proceedings.*

And for a further plea as to so much of the first count of the declaration as relates to divers, to wit, the first three of the said annual sums of one hundred dollars each in the first count of the declaration mentioned, and to part, to wit, ninety dollars of another, to wit, the fourth of the said annual sums, the defendant says that the plaintiff ought not to maintain his aforesaid action thereof against him, because he says that after the making of the promise in the first count mentioned, and before any of the annual sums in the introductory part of this plea mentioned became or were payable according to such promise and undertaking, to wit, on the said — day of —, A. D. —, at [§c.] a certain person, to wit, one G. P., was indebted to the defendant in a large sum of money, to wit, the sum of three hundred dollars with interest thereon, to wit, upon and by virtue of a certain promissory note theretofore made and delivered by the said G. P. to the defendant, and bearing date [§c.] whereby the said G. P. promised to pay to the defendant or order on demand the said sum of three hundred dollars, for value received, with interest from the date of the said note, and thereupon the plaintiff then and there requested the defendant not to enforce payment from the said G. P. of the said sum of money and interest, but to retain and appropriate to his own use, towards and in satisfaction and as in payment and discharge of the same sum and interest, so much of the said annual sums in the said first count mentioned, as and when the same became due, as would be sufficient to satisfy the said sum so due on the said note, and all interest due and thereafter to accrue due thereon or any part thereof; and thereupon it was then and there mutually agreed by and between the defendant and the plaintiff, that so much and such of the said annual sums becoming due and payable according to the said promise and undertaking as would be sufficient to satisfy and discharge the said sum so due on the said note, and all interest, as aforesaid, should from time to time, when and as the same became payable as aforesaid, be retained and appropriated by the defendant to his own use, towards and in satisfaction and discharge of the said sum so due on the said note and all interest as aforesaid, and that such retaining and appropriation should be substituted for and operate as payment by the defendant to the plaintiff of so much and such of the said annual sums as aforesaid, and also for and as payment by the said G. P. to the defendant of the said sum so due from the said G. P., with all interest as aforesaid, and that in the mean time and whilst so much and such of the said annual sums were becoming payable, the defendant should not enforce payment by the said G. P., or other the person or persons for the time being liable on the said note of the said sum and interest, or any part thereof; and the defendant avers that he, relying on such agreement, did not whilst the annual sums in the introductory part of this plea mentioned were respectively becoming payable, or at any other time, enforce

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or receive payment from the said G. P., or other the person or persons for the time being liable on the said note, of the said sum so due on the said note and interest, or any part thereof; and that he, the defendant, in further pursuance of the same agreement, as and when the several annual sums and part of an annual sum in the introductory part of this plea mentioned respectively became due and payable, retained and appropriated the same to his own use towards and in satisfaction and discharge of the said sum so due on the said note as aforesaid, with interest as aforesaid, in lieu of and as payment by him to the plaintiff of the same annual sums and part of an annual sum as aforesaid, and in lieu of and as payment by the said G. P., or other the person or persons, for the time being liable on the said note to the defendant of the said sum so due on the said note with interest as aforesaid; and the said money and interest secured by the said note thereby became and were and are satisfied; and that the same annual sums and part of an annual sum as and when the same respectively became payable, according to the said promise of the defendant, were not more than sufficient to satisfy and discharge the said sum so due on the said note with interest as aforesaid; of all which premises the plaintiff then and there had notice; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action thereof against him, &c.

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11. *Plea of an agreement that a Debt due from the Plaintiff and a third person to the Defendant, should be set off against the Debt sought to be recovered, the Defendant paying the difference.*

And for a further plea as to the sum of forty-four dollars parcel of the several moneys in the said declaration mentioned, and the supposed causes of action in respect thereof, the defendant saith that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith, that after the said sum of forty-four dollars, parcel, &c. became due, and before the commencement of this suit, to wit, on [&c.] at [&c.] one E. F. and the plaintiff were indebted to the defendant in a large sum of money, to wit, thirty-three dollars, upon and by virtue of a certain judgment of the Court of Common Pleas of ———, county, Ohio, by him the defendant heretofore, to wit, on [&c.] at [&c.] recovered against the said E. F. and the plaintiff, whereby it was considered and adjudged in and by the said Court, that the defendant should recover against the said E. F. and the plaintiff a certain debt of fifty-nine dollars, and also ——— dollars for his damages which he, the defendant, had sustained by reason of the detaining of the said debt, and ——— dollars for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. and the plaintiff were convicted, as by the record and proceedings thereof remaining in the last mentioned Court fully appears; and the said respective sums of forty-four dollars and thirty-three dollars being due and in arrear,

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heretofore and before the commencement of this suit, to wit, on [§c.] at [§c.] it was agreed by and between the defendant and the said E. F. and the plaintiff, that the defendant should abandon all claim upon the said judgment, and should not take any proceedings thereon against the said E. F. and the plaintiff, or either of them, and that the defendant should pay to the plaintiff the sum of eleven dollars, being the difference between the said sum of forty-four dollars and the said sum of thirty-three dollars, and that the plaintiff should thereupon abandon all further claim as to the sum of thirty-three dollars, parcel of the said sum of forty-four dollars, and should not take any proceedings against the defendant to recover the same, and that the said respective sums of thirty-three dollars and thirty-three dollars should, upon such payment of the said sum of eleven dollars being so made, be set off against each other, and all claims and causes of action in respect of the said sum of forty-four dollars, parcel, &c., and of the said sum of thirty-three dollars so due on the said judgment, and every part of such sums, should cease and be extinguished and satisfied; and the defendant avers, that in pursuance of the said agreement, he, the said defendant, hath ever since the making thereof abandoned all claim upon the said judgment, and hath not taken any proceedings thereon against the said E. F. and the plaintiff, or either of them; and the defendant, after the making of the said agreement, to wit, on [§c.] at [§c.] in pursuance of such agreement, paid to the plaintiff, and the plaintiff then and there received of and from the defendant, the said sum of eleven dollars, being the difference between the said sum of forty-four dollars and the said sum of thirty-three dollars so due upon the said judgment, upon the terms aforesaid; and the said respective sums of thirty-three dollars and thirty-three dollars were thereupon set off against each other, and all claims and causes of action in respect of the said sum of forty-four dollars, parcel, &c. and of the said sum of thirty-three dollars so due on the said judgment, and every part of such sums, thereupon then and there ceased and were and are thereby extinguished and satisfied; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action thereof against him, &c.

12. *That the Plaintiff and third person had mutual Accounts, and that it was agreed between them and the Defendant, that the Debt of the latter should be accredited to the Plaintiff in his account with the third party, who should be paid by the Defendant.*

And for a further plea as to the sum of fifty dollars, parcel of the said first mentioned sum of one hundred dollars, the defendant saith, that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith, that the plaintiff, after the said cause of action as to the said sum of fifty dollars, parcel, &c., had accrued, and before the commencement of this, to wit, on the — day of —, A. D. —, at said county of —, was indebted to one T. J. in divers sums of money, and the said T. J. was then

and there indebted to the plaintiff in divers other sums of money, and the plaintiff and T. J. being so respectively indebted to each other, it was then and there mutually agreed by and between the plaintiff and the defendant, and the said T. J., that an account should be had and stated, by and between the said T. J. and the plaintiff, concerning the monies in which they were so respectively indebted to each other, as aforesaid, and that the plaintiff should be accredited in such account, with the said sum of fifty dollars, parcel, &c., and that the plaintiff should be allowed the amount thereof, in such account, as though the same were a debt due from the said T. J. to the plaintiff; and that the said T. J. should accept the defendant, instead of the plaintiff, as his debtor as to the sum of fifty dollars, and that the plaintiff should have no further claim against the defendant, in respect thereof, and that, as to such sum so to be allowed in such accounts, the said T. J. should have no further claim against the plaintiff; and the defendant further saith, that in pursuance of such agreement, afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, at the county aforesaid, an account was had and stated by and between the said T. J. and the plaintiff, concerning the monies in which they were so respectively indebted to each other, as aforesaid, and the plaintiff was then and there accredited in such account, with the said sum of fifty dollars, parcel, &c., and the plaintiff was then and there allowed by the said T. J., the amount thereof, as though the same had been a debt due and owing from the said T. J. to the plaintiff, and the said account, the balance whereof, against the plaintiff, amounted to fifty dollars, was then and there finally stated and settled, in pursuance of the said agreement, with such credit allowed therein, and the said T. J. then and there accepted the defendant as his debtor as to the said sum of fifty dollars, parcel, &c., on the terms aforesaid, and the plaintiff then and there accepted such premises in full satisfaction and discharge of the said cause of action, as to the said sum of fifty dollars, parcel, &c.; and this the defendant is ready to verify; wherefore, [*&c., as in last plea.*]^a

13. *Plea that the Debt has been extinguished by an agreement between the Plaintiff and the Defendant, and a third person, who was the Defendant's Debtor, that the Plaintiff should accept such third person as his Debtor, in lieu and discharge of Defendant.*^a

And for a further plea, as to the said supposed promises in the said declaration mentioned, so far as the same relate to the sum of two hundred and twenty dollars, parcel of the several moneys in the said declaration mentioned, the defendant says that the plaintiff ought not to maintain his aforesaid action thereof against him, because he says, that after the making of the said promises in the said declaration mentioned, as to the said sum of two hundred and twenty dollars, parcel, &c., to wit, on, [*&c.,*] at, [*&c.,*] one F. F. was indebted to him, the defendant, in the sum of two hundred and twenty dol-

(a) See the cases, Chitt. Jun. Contr. 2d ed. 482, 483, 585, 592.

lars, for the price and value of goods before then and there sold and delivered by the defendant to the said F. F., at his request; and it was thereupon then and there agreed, by and between the plaintiff and the defendant, and the said F. F., that the defendant should relinquish and abandon his said claim against the said F. F., for the said sum of two hundred and twenty dollars, due to him, the defendant, and that he, the said F. F., should and would pay, and he then and there promised the plaintiff to pay the said last mentioned sum of money to him, the plaintiff, instead of the defendant, and that the plaintiff should and would accept and take the said F. F., as the debtor of him, the plaintiff, for the said last mentioned sum of money, in lieu of the defendant, in respect of the said sum of two hundred and twenty dollars, parcel, &c.; and should have no further claim against the defendant in respect of the said sum of two hundred and twenty dollars, parcel, &c., and the defendant further says, that in pursuance of the said agreement, so made as aforesaid, he, the defendant, did then and there relinquish and abandon, and hath thence hitherto relinquished and abandoned his said claim against the said F. F., for the said sum of two hundred and twenty dollars, so due to him, the defendant, and the plaintiff then and there accepted the said F. F. as his debtor, on the terms aforesaid; and this he, the defendant, is ready to verify; wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action thereof against him, &c.

14. *Plea that Plaintiff and the Defendant's other Creditors agreed to take a Composition on Defendant's Debts, in full discharge of their Claims, &c.**

And the defendant, by —, his attorney, as to the sum of fifty dollars, parcel of the moneys in the said [first count of the said] declaration mentioned, says that the plaintiff ought not to maintain his aforesaid action thereof against him, because he says that after the making of the said promises in the said declaration mentioned, as to the said sum of fifty dollars, parcel, &c., and before the commencement of this suit, to wit, on, [&c.] at, [&c.] the said defendant was indebted to the said plaintiff in the said sum of fifty dollars, parcel, &c., and to divers other persons, respectively, in divers large sums of money, and was in bad and embarrassed circumstances, and unable to pay or satisfy the plaintiff and the said other creditors of the defendant, respectively, their debts in full, whereof the plaintiff and the said other creditors, then and there had notice; and thereupon the defendant then and there offered and agreed to and with the plaintiff and his, the defendant's other creditors, to pay, and the said plaintiff and the said other creditors of the defendant, mutually agreed with each other, and with the defendant, to accept of him a certain composition, to wit, at the rate of fifty cents on the dollar, as a composition for, upon,

(a) An agreement with other creditors of a debtor to accept a composition, bars the claim to the residue of the debt, if the debtor perform his part of the contract; because it is a fraud on the part of one creditor to attempt to enforce payment of the remainder of the demand, in violation of the general and tacit understanding.

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and in full discharge and satisfaction of their said respective debts in full; and the defendant further saith that the said composition or sum of fifty cents upon the dollar on the said sum of fifty dollars, amounts to the sum of twenty-five dollars, parcel thereof, and that he, the said defendant, before the commencement of this suit, to wit, on, [&c.,] aforesaid, at, [&c.,] paid to the plaintiff, and the plaintiff then and there accepted and received of and from the defendant the said sum of twenty-five dollars, as and for such composition upon the said sum or debt of fifty dollars, parcel, &c., in pursuance of the said agreement: and this the defendant is ready to verify; wherefore, [&c. *Add plea to the rest of the declaration.*]

15. *Plea that the Plaintiff and other Creditors of the Defendant agreed to take a Composition on their Debts, payable by Instalments; — that Plaintiff discharged Defendant from tendering the Composition at the stipulated Times — and Tender thereof before Action.*

And as to the said sum of two hundred dollars, [*the full debt,*] parcel, [&c.,] the defendant says, [&c., *proceed as in last form, to the asterisk, and then proceed:*] such composition of fifty cents on the dollar, to be paid by the defendant to the plaintiff and the said other creditors of the defendant, respectively, as follows, to wit, half thereof down, and the remainder, divers, to wit, six months then following, and the plaintiff and the said other creditors of the defendant, then and there mutually agreed with the defendant, and with each other, not to proceed against the defendant for the recovery of the residue of the said respective debts and demands; unless default should be made in payment of such composition; and the defendant further saith that the composition or sum of fifty cents on the dollar on the said sum of — dollars, amounts to a large sum, to wit, the sum of — dollars, and that he, the defendant, at the time of making the said agreement in this plea men-

(a) The said composition of fifty cents upon the dollar, to be secured to each of the said creditors, including the plaintiff, by promissory notes of the defendant for fifty cents on the dollar upon the said respective debts, each payable respectively to the plaintiff and the said other creditors of the defendant, respectively, or order, at four and eight months from the — day of —, A. D. —; and the said plaintiff and the other creditors of the defendant, then and there agreed together, and with the defendant, upon the receipt of the said notes, to execute a release to the defendant, of the remainder of their debts, respectively, [*as the case may be,*] and in the mean time not to proceed against the defendant for the recovery of the residue of their respective demands.

(b) If the composition were to be paid by notes, state: "He, the defendant, within a reasonable time after the making of the said agreement, and before the commencement of this suit, to wit, on, [&c.,] at, [&c.,] duly made and delivered to the plaintiff, and the plaintiff then and there took and received of and from the defendant, for and on account and in payment of such composition of fifty cents upon the dollar on the said debt or sum of — dollars, parcel, &c., divers, to wit, two promissory notes for the payment, respectively, by the defendant to the plaintiff, or order, of — on such sum of fifty dollars, parcel, &c., at the respective times so agreed upon as aforesaid."

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tioned, was, and always from thence hitherto hath been and still is, ready and willing to pay the plaintiff the said composition on the said sum of — dollars, parcel, &c.; but to receive the same, or any part thereof, of the defendant, he, the plaintiff, hath always wholly refused, and the plaintiff then and there discharged the defendant from tendering or paying to him, the plaintiff, the said composition at the times for payment thereof; and the defendant further saith that after the making of the said agreement, and before the commencement of this suit, to wit, on, [*&c.*] at, [*&c.*] he, the defendant, was ready and willing, and tendered and offered to pay to the plaintiff the said sum of — dollars, parcel, &c., to receive which of the defendant, the plaintiff then and there wholly refused; and the defendant now brings here into court the said sum of — dollars, parcel, &c., ready to be paid to the plaintiff, if he will accept the same: and this the defendant is ready to verify; wherefore, [*&c.*]

16. *Replication—Denial of the Agreement.**

The plaintiff as to the said plea as to the said sum of fifty dollars, parcel, &c., saith that he ought not to be barred from maintaining his aforesaid action thereof against the defendant, because he saith that it was not agreed by the defendant and plaintiff, and the said other creditors of the defendant, that, [*&c., stating the alleged agreement,*] in manner and form as the defendant hath in his said plea alleged; and this the plaintiff prays may be inquired of by the country, &c.

17. *Plea that the Defendant accepted a Bill of Exchange, not yet due, on account of the Debt.^b*

The defendant, by —, his attorney, as to the sum of — dollars, parcel

(a) This puts the defendant on proof of the agreement alleged, and that the plaintiff concurred therein. If the plaintiff admit the agreement as set out, but contend that defendant has been guilty of fraud, or has violated his part of it, so that he, the plaintiff, is discharged from its operation, the replication may state the matter specially; see a form denying the agreement as alleged, *Reay v. Richardson*, 2 C. M. & R. 425.

(b) See *ante*, p. 672. It is a good plea to an action for a debt, that the defendant has accepted or indorsed to the plaintiff "for and on account thereof," a bill or other negotiable security, without showing that the bill was taken "in satisfaction of the claim and damages," &c.; see

the cases, *Kearslake v. Morgan*, 5 T. R. 513; *Kendrick v. Lomax*, 2 C. & J. 406; *Stedman v. Gooch*, 1 Esp. R. 3; *Chit. jun. Contr.* 2d ed. 598 to 600. But the right to sue for the original debt, revives in such case if the bill be dishonored; *id.* Where the bill of a third person, or of one of several debtors, is agreed to be and is taken absolutely "in satisfaction of the debt and damages," see *Thompson v. Percival*, 5 B. & Ad. 925; 3 N. & M. 167, S. C.; *Kirwan v. Kirwan*, 2 C. & M. 617;) the plea should be framed accordingly, stating the taking in satisfaction, and not merely "for and on account;" see form of plea of accord and satisfaction, *ante*, 664.

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of the moneys in the declaration mentioned,^a says that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith that after the making of the said promises as to the said sum of — dollars, and before the commencement of this suit, to wit, on, [*&c.*, *date of bill*,]^{* at, [*&c.*,]} the plaintiff, for and on account of the said sum of — dollars, parcel, &c., and the said promises in respect thereof, made and drew his certain bill of exchange in writing, bearing date, [*&c.*,] and thereby required the defendant, [two months] after the date thereof, which period had not elapsed at the time of the commencement of this suit,^b [*or, hath not yet elapsed, if the fact be so,*] to pay to the plaintiff, or order, a certain sum, to wit, the sum of — dollars,^c for and on account of the said sum of — dollars, parcel, &c., and the said promises in respect thereof, then and there accepted the said bill so drawn as aforesaid, and then and there delivered the same to the plaintiff, and the plaintiff then and there took and received the same^d for and on account of the said sum of — dollars, parcel, &c., and the said promises in respect thereof; and this the defendant is ready to verify, [*&c.*, *prayer of judgment; ante, 673, form 13.*]

18. *Replication—Denial that the Plaintiff took the Bill.*^e

The plaintiff, as to the said plea as to the said sum of — dollars, parcel, &c., saith that he ought not to be barred from maintaining his aforesaid action thereof against the defendant, because he saith that he did not accept [take] or receive the said bill of exchange for or on account of the said sum of — dollars, parcel, &c., as in the last mentioned plea alleged; and this the plaintiff prays may be inquired of by the country, and the defendant doth the like, &c.

(a) It is a rule that a bill for a smaller sum cannot be pleaded as taken on account of a larger. The plea must therefore be confined as above to so much of the moneys or debt sued for, as the bill will cover, and no more, otherwise the plea will be substantially bad; *Thomas v. Heathorn*, 2 B. & C. 477; 3 D. & R. 647, 8. C.; *Chit. jun. Bill*, 1197, S. C.

(b) It seems to be necessary to show this, at least where the defendant as acceptor was the primary debtor.

In *Kearslake v. Morgan*, 5 T. R. 513, the plea showed that the note was due *before* action; but there the note was made by a third person and indorsed by defendant.

(c) See *supra*, note (a.), p. 675.

(d) It must be distinctly alleged that the bill was given by defendant and received by plaintiff on account, &c.; *Simon v. Lloyd*, 3 Dowl. P. C. 813.

(e) The above replication puts the defendant on proof that the bill was applicable to and taken for the debt sued for. It is not proper, where the defendant can prove that such was the case, and the plaintiff relies on a subsequent dishonor of the bill; see Form 3. *New assign*, if such a bill was once received for a former similar debt.

19. *Replication, (to a Plea that the Defendant accepted a Bill on account,) that the Bill was dishonored when due.*

And the plaintiff, as to the said plea as to the said sum of — dollars, parcel, &c., saith that he, the plaintiff, ought not to be barred from maintaining his aforesaid action thereof against the defendant, because he says that the said bill of exchange in the said last mentioned plea mentioned, became and was due and payable according to the tenor and effect thereof, before the commencement of this suit, to wit, on, [*&c.*] but that the defendant did not, nor would when the same became so due and payable as aforesaid, or at any other time, pay the amount of the said bill or any part thereof; and the plaintiff, before and at the time of the commencement of this suit, held and now holds the said bill unpaid and unsatisfied, although the defendant hath often been requested^a to pay the same: and this the plaintiff is ready to verify; wherefore, [*&c.*, *prayer of judgment; ante, 642, form 5.*]

20. *Plea that the Defendant accepted a Bill not due, in payment of the Debt, and for Plaintiff's Accommodation, and delivered it to the Plaintiff without a Drawer's name attached thereto.^b*

The defendant, by —, his attorney, as to the sum of forty dollars, parcel of the moneys in the said declaration mentioned, says that the plaintiff ought not to maintain his aforesaid action against him, because he says that after the making of the said promises in the said declaration mentioned, at to the sum of forty-dollars, parcel, &c., and before the commencement of this suit, to wit, on, [*&c.*] at, [*&c.*]* the defendant, at the plaintiff's request, made and drew a certain instrument purporting to be a bill of exchange, dated the day and year last aforesaid, without a drawer's name thereto, and whereby the defendant was requested to pay to such person, or his order, who should place his name thereto as the drawer thereof, fifty dollars, two months after the date thereof, as for value received in goods and cash; and the plaintiff then and there requested the defendant to accept the same towards payment and satisfaction of the said sum of forty dollars, parcel, &c., and for the plaintiff's benefit and accommodation as to the rest of the said sum of fifty dollars, to be payable thereby, and the defendant then and there accordingly accepted the

(a) The defendant, being the acceptor, was not entitled to presentment or demand of payment. If the defendant were the *drawer* or *indorser* of the bill, it should be averred that it was presented for payment when due, and that defendant had due notice of dishonor, see forms, *ante, 242.*

(b) This was the form of plea in *Simon v. Lloyd*, 3 Dowl. P. C. 813. The plaintiff replied that the bill remained in his hands unnegotiated and unpaid, and without any drawer's name put to it: Held, that the replication was no answer to the plea, and that the plea was good; at least as it was not demurred to. *Sem- ble*, it was not open even to a demurrer.

Accord and Satisfaction, &c.

said bill or instrument, and delivered the same to the plaintiff, on the terms aforesaid, and thereby became and was liable to pay to the plaintiff, or such person who should place his name thereto as the drawer thereof, or his order, the said sum of fifty dollars, two months after the date thereof, that is to say, towards payment of the said sum of forty dollars, parcel, &c., and for the plaintiff's benefit and accommodation, as to the rest of the said sum of fifty dollars, [and the plaintiff then and there accepted and received the said bill or instrument, in and towards payment and satisfaction of the said sum of forty dollars, parcel, &c.,] and by reason thereof, and according to the law and custom of merchants, he, the defendant, then and there became, and was and still is liable, to pay to such person who has placed, or shall place his name to the said instrument or bill of exchange as the drawer thereof, or his order, the said sum of money in the said instrument or bill of exchange specified, according to the tenor and effect thereof, and of his, the defendant's acceptance thereof; [and the defendant avers that the time for the payment of the money in the said bill or instrument specified, had not, at the time of the commencement of this suit, elapsed, nor had the said bill or instrument then become due or payable;* and this the defendant is ready to verify; wherefore, [&c., conclude *ae ante*, 673, form 13.

21. *That the Defendant indorsed a Bill to the Plaintiff on account of the Debt.*

As in the last form to the asterisk:] The defendant, for and on account of the said sum of — dollars, parcel, &c., and the said promises in respect thereof, indorsed and delivered to the plaintiff a certain bill of exchange, in writing, bearing date, [&c.,] heretofore, to wit, on the day and year last aforesaid, at the county aforesaid, drawn by the defendant on, and accepted by one E. F., and whereby the defendant requested the said E. F. to pay to him, the defendant, or order, [two months] after the date thereof, [*add, if the fact be so, "which period had not elapsed when this action commenced,"*] the sum of — dollars, for value received, and the plaintiff then and there took and received [&c., *proceed and conclude as in form 17, ante 676.*

22. *That Defendant indorsed to the Plaintiff on account, a Bill upon a third Person, and was discharged by laches, &c., in respect thereof.*

The defendant, by — his attorney, as to the sum of — dollars, parcel of

(a) These words between the brackets were added on an amendment, the Court considering the plea bad without them; *Simon v. Lloyd*, 3 Dowl. P. C. 813.

(b) Or, if a third person were the drawer,

aver that fact, and state his endorsement to the defendant.

(c) It would probably be sufficient in this plea to show merely that the plaintiff took another bill on account, upon the principle of Form 17.

Administrator—General Issue—not Administrator.

the moneys in the said declaration mentioned, saith that, [*&c., proceed as in the last form to the end, showing that plaintiff took the bill on account, and then proceed:*] and the defendant avers that the said bill so taken by the plaintiff, as in this plea mentioned, was not presented for payment thereof, on the day when the same became due and payable, according to the tenor and effect thereof, [*or, "that the defendant had not due notice of the non-payment of the said bill, when the same became due and payable according to the tenor and effect thereof," according to the fact;* and this the defendant is ready to verify; wherefore, [*&c., as before.*

SEC. III. ADMINISTRATOR.

23. *Plea of the General Issue by an Administrator or Executor.*

C. D., executor, [*or, "administrator,"*]
 ads. &c., of J. K., deceased. } ——— Com. Pleas.
 A. B.

And the said C. D., executor [*or, administrator,*] as aforesaid, defendant in this suit by G. H., his attorney, comes and defends the wrong and injury, when, &c., and says that the said J. K., deceased, in his life time, *did not undertake*, or promise [*if there be promises by the executor, &c., laid in the declaration, add,—*"nor did the said defendant undertake or promise"] in manner and form as the said plaintiff hath above thereof complained against him. And of this he puts himself upon the country. [*And the said plaintiff doth the like, &c.*]

G. H., Defendant's Attorney.

24. *Plea that Defendant is not Administrator.*^b

C. D., sued as administrator, &c. }
 ats. }
 A. B.

[*Commence as ante, No. 4, to the *, then as follows:*] says that he is not

ante. 675. The plaintiff would then be bound, in his replication, to deny that he took the bill for and on account of the bill mentioned in the first count as alleged; or to show that the renewed bill was presented for payment when due, but was dishonored, of which the defendant had due notice, so that the plaintiff was restored to his former rights. Where, however, the defendant has a clear defence by reason of the renewed bill having been satisfied before action, or the plaintiff having indorsed it away, and not then being the holder, or on account of laches in pre-

sending it, or giving notice of dishonor, it may be better at once to plead such matter also, upon the principle of the above form. Some prolixity and delay may thus be avoided.

(a) Or, "that the said bill, &c., was duly paid by the said E. F. when due;" or if paid afterwards, so state.

(b) See Com. Dig. Adminis'r, B. 1. Pleader, 2 D. 18; 2 Saund, 47, note; Picard v. Brown, 6 T. R. 550; 1 Wms. on Executors, 181; 1 Saund. 275, note 3.

Plea that cause of Action was Arbitrated.

nor ever was administrator of the goods, chattels, or credits, which were of the said E. F., deceased, in manner and form as the plaintiff hath, in his said declaration, alleged; and of this the defendant puts himself upon the country, &c. [*In some forms this plea concludes with a verification.*]

25. *Plea that Defendant was duly appointed Administrator, and gave due Notice, and Plaintiff did not, within four years, commence his suit, &c.*^a

C. D., administrator of E. F. }
 ats. } ——— Com. Pleas.
 A. B. }

[*Commencement as at ante, p. 664, No. 4, and then as follows:*] says that more than four years next before the commencement of this suit, to wit, on, [*&c.*] at, [*&c.*] he, the said C. D., was duly appointed administrator of the goods and estate of the said E. F., deceased, and then and there accepted that trust, and gave bond, according to the statute in such case made and provided, of that date, for the discharge of his said trust; and afterwards, and within three months after giving said bond, and the acceptance of said trust, as aforesaid, to wit, between the — day of — and the — day of [*&c.*] at, [*&c.*] where the said E. F., deceased, last dwelt, he, the said C. D., caused notice of his said appointment to be published for three consecutive weeks, in the [*name the paper.*] a newspaper of general circulation in said county of —, where the said E. F. last dwelt, as aforesaid; and the defendant further avers that the said several causes of action in said declaration mentioned, accrued to the said plaintiff more than one year before the commencement of this suit, [and within the period of four years next before the commencement of this suit^c] to wit, on [*&c.*] and at said county; and this the defendant is ready to verify, &c.; wherefore [*&c.*, *prayer of judgment, as ante p. 664, form 4.*]

SEC. IV. ARBITRAMENT AND AWARD.

26. *Plea of Arbitrament and Award, (without performance,) to a declaration upon a Contract to recover general Damages.*^b

[*Title and commencement as ante p. 664, No. 4, to the *, then as follows:*] saith, that after the making of the promises and undertakings in the said dec-

(a) See 45 vol. Stat. 25; Swan's Stat. 357, 358.

(b) See in general Com. Dig. "Accord," (A. 1;) Bac. Ab. "Arbitrament."

It is no plea to an action to recover a debt that the parties referred the claim to arbitration, and that the arbitrator awarded a cer-

tain sum to be paid in money, unless payment or a tender of that sum be alleged; but in an action to recover *general damages* on a special contract, arbitrament and award, without performance, may be pleaded to a count on the original contract.

(c) The matter in brackets seems unnecessary.

Arbitrament and Award.

laration mentioned, and before the commencement of this suit, to wit, on, [*&c.*], at, [*&c.*] certain differences having arisen, and being depending respecting the same between the plaintiff and the defendant, they mutually submitted themselves to refer, and did then and there refer the said matters in difference to the award, order and arbitrament of W. H. and T. F., and in case they should not agree, then to the umpirage of T. P., and agreed that the decision of the said arbitrators or umpire should be final, so as the said award or umpirage should be made in writing, ready to be delivered to the said parties, or such of them as should desire the same, on or before the — day of — then next; and the defendant further saith, that afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration that the defendant had then and there promised the plaintiff to perform and fulfil the said award or umpirage in all things to be contained therein, on the part of the defendant to be performed and fulfilled, he, the said plaintiff, then and there promised the defendant to perform and fulfil the said award or umpirage in all things to be contained therein, on his, the said plaintiff's part, to be performed and fulfilled; and the defendant further saith, that the said W. H. and T. F., not having agreed upon the matters so referred to them, the said T. P. thereupon in due time, to wit, on the — day of —, in the year aforesaid, took upon himself the burthen of said arbitration and umpirage, and having duly examined and considered the said subject-matter in difference between the plaintiff and defendant, he, the said T. P., did then and there make and publish his award and umpirage, in writing, under his hand, of and concerning the premises, ready to be delivered to the said parties, and did thereby then and there award and declare of and concerning the said matters in difference so referred, that the defendant should pay the plaintiff the sum of — dollars, on the — day of — then next, as by the said award, reference being thereto had, will more fully appear; and this the defendant is ready to verify, &c.; wherefore, [*&c.*]

27. *Replication thereto.*

[*The replication may be, if the reference to arbitration be denied, "that the plaintiff and defendant did not submit themselves to, or agree to refer, or refer the said matters in difference to the award, order or arbitrament of the said W. H. and T. F., or in case they should not agree, then to the umpirage of the said T. P., in manner and form as the defendant hath, in his plea, alleged; and of this the defendant puts himself upon the country, &c.;" or if the award be denied, "that the said — did not make the said supposed award," &c., see post, Pleas, in Debt; or the plaintiff may reply a revocation of the submission, or new assign that the matters in dispute mentioned in the declaration are other than and different from the matters referred.*]

(a) As to the averments showing the submission and award, see ante, vol. 1, 235, 236.

Plea of Bankruptcy.

SEC. V. BANKRUPTCY.

28. *Plea of Discharge under Bankrupt Act.*

And for a further plea in this behalf, the said defendant, by leave of the court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiffs ought not to have or maintain their aforesaid action against him, because he says that after the making of the said several supposed promises and undertakings and accruing of the said several causes of action in the said plaintiff's declaration mentioned, if any such were made or accrued, and before the commencement of this suit, to wit, on the [eighteenth day of February, in the year of our Lord one thousand eight hundred and forty-two,] he, the said defendant, was a resident of the county of —, and State of [Ohio,] in the district of [Ohio,] and within the jurisdiction of the District Court of the United States for the said district of [Ohio,] and there owed debts which had not been created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary character, and was then and there a bankrupt within the true intent, meaning and purview of the act of Congress, entitled, "An act to establish a uniform system of bankruptcy throughout the United States, approved August nineteenth, eighteen hundred and forty-one," and that he, the said defendant, being such resident and owing such debts as aforesaid, did in pursuance of the aforesaid act of Congress, on the day and year last aforesaid, to wit, at [Columbus, in the said State and district of Ohio,] to wit, at the city of [—, in the county of —,] aforesaid, by his petition setting forth to the best of his knowledge and belief, a list of his, the said defendant's creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his property, rights and credits of every name, kind and description, and the location and situation of each and every parcel and portion thereof, and duly verified by his oath, apply to the said District Court of the United States for the district of [Ohio,] the said Court being then and there held by and before the Hon. H. H. L., the district Judge of the United States for the said district of [Ohio,] and the said Judge then and there having competent power and authority to hold said Court by virtue of the aforesaid act of Congress, and did in and by the said petition, then and there declare himself unable to meet his engagements, and pray to be declared a bankrupt, as by the said petition and the schedules thereto annexed, now on file in the office of the Clerk of the said District Court will appear; and that such proceedings were had upon the said application and petition by and before the said District Court of the United States for the district of [Ohio,] pursuant to the said act of Congress, that afterwards, and after the said defendant had been by the said Court duly declared a bankrupt by virtue of, and according to the true intent and meaning of the said act of Congress, to wit, on the [fourth day of October, in the year of our Lord one thousand eight hundred and forty-two,]

Plea of Bankruptcy.

to wit, at [Columbus, in the said State and district of Ohio,] to wit, at [—, in the county aforesaid,] the said District Court of the United States for the district of [Ohio,] the said Court being then and there held by and before H. H. L., the district Judge of the United States for the said district of [Ohio,] and the said Judge then and there having competent power and authority to hold said Court, did by a certain order and decree, then and there made and entered by the said Court, decree and allow that the said defendant be, and he accordingly thereby was fully discharged of and from all his debts owing by him at the time of the presentation of his said petition to be declared a bankrupt, and did then and there in and by the said decree, further order that the Clerk of the said Court should duly certify the said decree under the seal of the said Court, and deliver the same to the said defendant, the said bankrupt, when demanded, as by the said order and decree now remaining of record in the said court will fully appear. And the said defendant further in fact says, that afterwards, to wit, on the [nineteenth day of January, in the year of our Lord one thousand eight hundred and forty-three,] to wit, at the place aforesaid, one W. M., then and there being the Clerk of the said District Court, did in pursuance of the aforesaid decree, certify on a copy of the said decree that the said copy was a correct copy of the decree and discharge of the said defendant as the same remained of file and record in said Court, and did then and there in pursuance of the directions and decree of said Court, affix his signature and the seal of the said Court to his said certificate, and did then and there deliver the said copy of decree so certified, and the said certificate to the said defendant, as and for his discharge and certificate as a bankrupt under the aforesaid act of Congress, which said certificate sealed with the seal of the said Court, this defendant now here brings into Court, and which bears date on the day and year last aforesaid.

And the said defendant further in fact says, that the said supposed debts and demands of the said plaintiffs in the said declaration of the said plaintiffs mentioned, and each and every of them, if any such there were, accrued before the presentation of the said petition of this defendant to be declared a bankrupt as aforesaid, and were, and each of them was and is proveable under the said act of Congress, and the aforesaid proceedings in the District Court of the United States for the district of [Ohio,] against the estate of this defendant as such bankrupt as aforesaid, and in the course of the proceedings in bankruptcy aforesaid, so as aforesaid had upon and in pursuance of the aforesaid petition of the said defendant, and according to the provisions of the said act; and that they were not, nor was any or either of them, or any part thereof, created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity, and this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action against him, &c.

And for a further plea in this behalf, the said defendant, by like leave of the Court here for that purpose first had and obtained, says, that the said plain-

Plea of Bankruptcy.

tiffs ought not to have or maintain their aforesaid action against him, because he says that after the making of the said several supposed promises and undertakings in the said plaintiffs' declaration mentioned, and the accruing of the said several causes of action in the said plaintiffs' declaration mentioned, to wit, on the [eighteenth day of February, 1842,] he, the said defendant, then being a resident of the city of —, in the county of —, and State of [Ohio,] within the district of [Ohio,] and the jurisdiction of the District Court of the United States for the said district of [Ohio,] and being also then and there a bankrupt within the true intent, meaning and purview of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved August 19, 1841," and then and there owing debts which had not been created in consequence of a defalcation as a public officer or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, did by a petition setting forth to the best of his, the defendant's knowledge and belief, a list of the said defendant's creditors, and their respective places of residence, and the amounts due to each, together with an accurate inventory of his, the said defendant's property, rights and credits of every name, kind and description, and the location and situation of each and every parcel and portion thereof, which said petition was duly verified by the oath of him, the said defendant, apply to the said District Court of the United States for the said district of [Ohio,] the said Court then being held at [Columbus,] in the said district and State of [Ohio,] before the Hon. H. H. L., district Judge of the United States for the district of [Ohio,] and who then and there had full power and lawful authority to hold said Court by virtue of the said act of Congress, and did therein declare himself to be unable to meet his debts and engagements, and pray to be declared a bankrupt pursuant to the provisions of the said act, and that the said petition being then and there received and filed by the said District Court of the United States for the district of [Ohio,] such proceedings were thereupon had upon the said petition in and before the said Court, that afterwards, to wit, on the [fourth day of October, in the year 1842,] at [Columbus,] in the district and State of [Ohio,] aforesaid, to wit, at [—, in the county of —,] aforesaid, a certain decree was made and entered in and by the said Court in the said matter of the proceedings in bankruptcy upon his, the said defendant's aforesaid petition, the said Court being then and there held by and before the Hon. H. H. L., the district Judge of the United States for the said district of [Ohio,] who then and there had full power and lawful authority to hold said Court, which said decree was in substance and to the tenor and effect following, that is to say: [*Here set forth the decree for defendant's discharge, verbatim.*] As by the said decree now remaining on file and of record in the office of the Clerk of the said District Court of the United States for the district of [Ohio,] will fully and at large appear.

And the said defendant further in fact saith, that after the entry of the said decree, to wit, on the [nineteenth day of January, in the year of our Lord one thousand eight hundred and forty-three,] at [Columbus,] in the State and

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district of [Ohio,] aforesaid, one W. M., then and there being the Clerk of the said District Court for the district of [Ohio,] did under a true copy of the said decree, make and sign with his hand and affix thereto the seal of the said Court, a certain certificate in the words and figures following, viz : [*Here set forth the certificate, verbatim.*]

And the said defendant in fact says, that the said decree discharging him, the said defendant, of and from all his debts, was made and entered by the said District Court of the United States for the district of [Ohio] aforesaid, and the certificate of such discharge granted to him, the said defendant, as aforesaid, by the said Court in manner aforesaid, before the commencement of this suit. And the said defendant further in fact says, that the said promises and undertakings in the said plaintiffs' declaration mentioned, were and each of them was made, and the said plaintiffs' cause of action in the said declaration mentioned, arose and accrued before the presentation of his, the said defendant's said petition to be declared a bankrupt as aforesaid, and before the granting of the said discharge and certificate by the said District Court, and the said plaintiffs' said demand and cause of action in the said plaintiffs' said declaration mentioned, and every part thereof was and is proveable in the proceedings aforesaid against the estate of the said defendant, under and by virtue of the said act of Congress, according to the true intent and meaning thereof, and that the said plaintiffs' said demand and cause of action was not, nor was any part thereof, created in consequence of defalcation as a public officer or as an executor, administrator, trustee, or while acting in any other fiduciary capacity, and this he, the said defendant, is ready to verify ; wherefore he prays judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against him, &c.

[*2 Humphrey's Prec. 891. See 1 Denio, 332.*]

29. *Another form of Plea of Discharge under Bankrupt Act since the last continuance.**

And now, at the present Term, until which term the said cause was continued, comes the said J. L., by C. F., his Attorney, and for a further plea in this behalf, by leave of the Court first had and obtained, says that the said plaintiff ought not further to have or maintain against him, the said J. L., his aforesaid action ; because he says that the said J. L., before and on the fifth day of September, in the year of our Lord eighteen hundred and forty-two, and from thence continually until the rendering the decree in bankruptcy and the final certificate and discharge of this defendant hereinafter mentioned, was a resident and citizen of the Western District of Virginia : And the said defendant, J. L., so residing in the said Western District of Virginia, as aforesaid, afterwards, on the fifth day of September, in the year eighteen hundred and forty-two, filed his petition in the District Court of the United States for the

(*) The plea is from *Strader v. Lloyd*. Ham. Sup. Court. Wil. 148.

Plea of Bankruptcy.

Western District of Virginia, setting forth, among other things, that he was owing debts which had not been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, and setting forth according to the best of his knowledge and belief, a list of his creditors and their respective places of residence, and the amount due to each, together with an inventory of his property, rights and credits of every name, kind and description, and the location thereof, verified by his oath, and in and by said petition declared himself to be unable to meet his debts and engagements, and prayed to be discharged and taken to be a bankrupt, and so to be declared by a decree of said District Court of the United States in and for the Western District of Virginia: And afterwards, on the seventeenth day of October, in the year aforesaid, he, the said defendant, by the Judge of the said District Court of the United States, was duly declared and decreed to be, a bankrupt. And afterwards, on the seventeenth day of October, in the year aforesaid, he, the said defendant, filed his petition in said Court, and therein and thereby prayed for a discharge from all his debts, and that a certificate thereof might be granted to him accordingly, and the creditors of the said defendant and all others in interest, having been duly notified thereof, and to appear on the tenth day of January, in the year eighteen hundred and forty-three, to show cause, if any they had, why the said discharge and certificate should not be granted; and the said defendant, having also complied with and obeyed all orders from time to time passed by the said Court in the said matter of bankruptcy, and having also otherwise conformed to the requisitions of the act of Congress in such case made and provided, and having done all other things which were necessary and proper for him to do, it was afterwards, on the tenth day of January, in the year eighteen hundred and forty-three, considered by the said District Court of the United States for the Western District of Virginia, that the said defendant was entitled to his discharge from all his debts, and to a certificate thereof to be granted to him accordingly, [and it was, therefore, by said Court adjudged, allowed and decreed, that the said defendant, J. L., be discharged from all his debts] and it was then and there further ordered, adjudged, allowed and decreed by said Court, that the said J. L. be discharged from all his debts, and that a copy of said decree, authenticated, in the manner in which such acts are usually authenticated, be made out and delivered to the said J. L., by the Clerk of the said Court as and for the certificate aforesaid.

And the said defendant further saith, that the said several causes of action, in the said declaration mentioned, accrued and each and every of them did accrue to the said Plaintiff before the said Defendant petitioned for, and was decreed to be a bankrupt, as aforesaid, to wit, at the county aforesaid; and which cause of action is not for debts created or owing by defendant in consequence of a defalcation as a public officer or executor, administrator or trustee, or while acting in any fiduciary capacity; and this, he, the said defendant, is ready to verify: Wherefore he prays judgment if the said Plaintiff ought further to maintain his aforesaid action thereof against him, &c.

Nul tiel Corporation—Coverture.

SEC. VI. CORPORATION.

30. *Plea of nul tiel Corporation.**

C. D.
ats.
The — Company of — } — Com. Pleas. In Assumpsit.

And the said defendant, C. D., by J. S., his attorney, comes and defends, &c., and says that the said The — Company of — ought not to maintain their action thereof against him, because he says that there is not, nor, on the day of the commencement of this suit nor ever since was there, in existence, any such Corporation called The — Company of —, as by the said writ and declaration is above supposed, and this he is ready to verify. Wherefore, he prays judgment if the said plaintiffs ought to maintain their aforesaid action thereof against him, &c.

J. S., Attorney for the defendant.

31. *Replication thereto.*

[*As in form No. 5, ante p. 665, to the *, and then as follows:*—because they say, that in pursuance of an act of the legislature of this state, entitled “An Act to incorporate the president, directors and company of the O. C. Bank,” passed [April 15th, 1830,] they, the said plaintiffs, became, and at the time of the commencement of this suit were, and still are a body politic and corporate, and have a right as such to commence and prosecute this suit. And this they are ready to verify. Wherefore they pray judgment, and their damages by them sustained, on occasion of the non-performance of the said several promises and undertakings in the said declaration mentioned, to be adjudged to them, &c.

SEC. VII. COVERTURE.

32. *Plea of Defendant's Coverture when the Contract was made.^b*

[*Commencement as ante p. 640, in person,*—says that at the time of the making of the said promise, she, the defendant, was and still is the wife of one E. F.; and this the defendant is ready to verify. Wherefore, [*&c., concluding with prayer of judgment.*]

(a) In cases of Foreign Corporations, the plaintiffs, under the general issue, are bound to show their corporate character; but in suits by our own Corporations, the Court ex-officio take notice of their corporate character. 12 Ohio Rep. 132. See 5 Ohio Rep. 283.

(b) See in general Chit. jun. Contr. 2d ed. 146, 672. This must be pleaded specially.—Coverture must be pleaded in abatement where the marriage took place after the debt was incurred, ante, 651. See form 8, *id.*

Crops.

33. *Replication thereto—denial of the Marriage.**

[*Title and commencement as ante p. 642, form 5, and then as follows:*—saith, that the defendant at the time of the making the said promise was not married to the said E. F. as in the said plea alledged; and this the defendant prays may be inquired of by the country, &c.

SEC. VIII. CROPS.

34. *Plea to a Declaration in Assumpsit by an outgoing Landlord against his incoming Tenant to recover the amount of a valuation of Crops and Tillages, &c., bought with a Lease;—That the Contract was void for want of writing under the Statute of Frauds.^b*

And for a further plea as to the said first count of the said declaration, the defendant saith that the said term of fourteen years in the said first count of the

(a) This replication puts the defendant on proof of the coverture at the time of the contract. The marriage may be proved by a certified copy of the Clerk's register, showing defendant's identity; or by persons present at the ceremony, or who can prove that by general reputation the parties were married, and co-habited together as such, &c., 2 Stark. Ev. tit. *Marriage*, 505, 2d ed.; *Leander v. Barry*, 1 Esp. R. 358; *Key v. Duchesse de Prenne*, 3 Camp. 123.

(b) In *Harvey v. Grabham*, 31 E. C. L. Rep. 270, the first count recited an agreement that plaintiff should grant, and defendant take, a lease of lands; and that all straw, &c., which should be on the lands when possession was given up to the defendant, should be valued to plaintiff by persons named respectively by plaintiff and defendant, and the amount paid to plaintiff by defendant: that, on the execution of the lease, defendant should accept it, and execute a counterpart; and that either party, making default in performance, should forfeit £800; mutual promises to perform the agreement: that defendant entered under the agreement, and took possession of the straw, &c.: that afterwards defendant proposed that the straw, &c., should be valued to plaintiff by D., on the respective behalves of plaintiff and defendant; that plaintiff assented: that the straw, &c., was valued to plaintiff by D.; that the plaintiff was ready to grant the lease according to the agreement, but defendant did not pay the amount of the valuation. Second count for goods bargained and sold

and taken by the defendant under such bargain and sale.

Plea to the first count, that the first agreement was in writing, signed by plaintiff and defendant; and the proposal and assent that D. should value, only verbal. To the second count, that the goods consisted of straw, &c., which were bargained and sold under a written agreement between plaintiff and defendant, according to which they were to be valued by persons chosen respectively by plaintiff and defendant; that no such valuation had been made, but only a valuation by D.: that defendant was ready, and had proposed, that they should be valued as in the agreement; but plaintiff refused.

Replication 1, to the plea to the first count, that, by the proposal and assent, and the valuation accordingly made, plaintiff and defendant respectively waived performance of so much of the agreement as related to the valuation, and substituted the valuation by D.: 2, to the plea to the second count, that the straw, &c., was bargained and sold under the agreement in the first count mentioned; that afterwards defendant proposed, &c., (as in first count,) and plaintiff assented, and D. valued accordingly: by means of which plaintiff and defendant waived, &c. (as in the replication to the plea to the first count.)

Rejoinder to replication 1, that the waiver and substitution were by word of mouth only. To replication 2, that the proposal and assent were by word of mouth only.

On general demurrer to the rejoinder: held,

De Injuria.

declaration mentioned was a certain term of fourteen years, which was to commence from the — day of —, A. D. —, and which was the — day of — next before the making of the said promise of the said defendant in the said first count mentioned; and the defendant further says that the said crops in the said first count mentioned, and the benefit of the said work, labor, and materials, in that count mentioned, were not, nor was any part thereof, agreed to be excepted or reserved, nor were they nor was any part thereof excepted or reserved out of the said agreement to let or letting in the first count mentioned; and the defendant further says, that no agreement in respect of or relating to the causes of action in the first count mentioned, or any or either of them, nor any memorandum or note thereof, wherein the said promise of the said defendant in that count mentioned was stated or shown, was in writing signed by the defendant, or any other person thereunto by him lawfully authorized; and this the said defendant is ready to verify, [*&c.* *Conclude as ante No. 30.*]

SEC. IX. DE INJURIA.

35. *Replication de injuria sua propria absque tali causa in Assumpsit or Debt.*

[*Title and commencement as at ante, page 642, form 5, then as follows:*] [as to the first plea of the defendant] says, that the defendant of his

that the original was an entire agreement relating to an interest in lands, and necessarily in writing; that, even if the parties could waive the whole verbally, they appeared by the record not to have done so; and that a part of it could not be verbally waived, even supposing that part to have been, if standing by itself, an agreement not required to be in writing.

In *Stowell v. Robinson*, 32 Eng. C. L. Rep. 386, it was held, 1. that the day for the completion of the purchase of an interest in land inserted in a written contract, cannot be waived by oral agreement, and another day be substituted in its place. 2. The failure to procure from the lessor, a license to assign, or to register previous assignments, before the day on which it is agreed to assign and give possession of leasehold premises, is not a breach of the agreement.

(a) As to this general form of replication, by which the whole of the facts stated in the plea are denied, see 1 Smith's L. C. 53 and notes. 46 E. C. L. Rep. 692.

This form of replication will probably be sanctioned by our courts, as affording a simple and brief mode of putting in issue the facts set up in the plea. At any rate it would be good after verdict.

The following remarks in relation to this plea are taken from the 1 Chitty's Prec. 293.

It is only applicable when the plea states an excuse for performance. 2 W. & W. 65. But when the plea amounts to a subsequent satisfaction after breach, or the plea derives any authority mediately or immediately from the plaintiff, this replication is bad. 2 C. M. & R. 150, Croate's case 6 Co. 66.

Nor can this form of replication be used where the plea contains any matter of record, because in such cases the allowing it would lead to a trial of an issue by the country, which ought to be tried by the record. See the resolutions in Crogate's case.

It is also laid down that it is inapplicable where the defendant in his own right, or as servant to another, claims any interest, as in such case the plea does not properly consist of matter of excuse. The species of interest here meant was explained by Park, J. in *Selby v. Bardons* 23 Eng. C. L. Rep. 2; to mean "an interest in the realty, or an interest in, or title to chattels, averred in the plea, and existing prior to, and independently of the act complained of, which

De Injuria.

own wrong, and without the cause by him in the said [first] plea alleged, [broke his said promise, in debt, say "neglected to and did not pay the said sum of money or any part thereof"] in the said [first count of the] declaration mentioned, in manner and form as the said plaintiff hath, in the said [first count of the said] declaration alleged; and this the plaintiff prays may be inquired of by the country, &c.

interest or title would be in issue under *de injuria*, the principle of the rule is, that such alleged interest or title shall be specially traversed," and see *Solly v. Neish*, *post*, per Lord Abinger.

So where the plea sets out a different contract than that declared on, which amounts to the general issue, this replication is bad, as it can only be applied where the plea admits a promise, per *Tindal, C. J., Whittaker v. Mason*, 29 Eng. C. L. Rep. 357. Assumpsit for money had and received; plea, that the money was the proceeds of goods belonging to the plaintiff and A., consigned to defendant as A.'s goods (with plaintiff's assent,) as a security for money advanced on them by A., and that the defendant sold them in ignorance of A.'s interest in them, and claiming a right to retain the defendant's lien upon them. A replication *de injuria* to this plea was held bad, inasmuch as the plea amounting to the general issue denied the promise, and did not offer an excuse for breaking it; the replication was also held bad in this case, because by the plea an interest was claimed in the goods, and authority (to retain them) was immediately derived from the plaintiff. So it would seem that a plea which alleges facts showing that no valid contract ever existed, such as illegality of the transaction on which the promise is founded, does not admit a promise, and therefore that *de injuria* cannot be replied to it: *ubi supra*. 1 Chitty's Prec. 293.

Care should be taken not to reply *de injuria* to a demurrable plea amounting to the general issue, for the defect of the plea would be waived over, and the replication would nevertheless be bad.

In the following cases the plea was held to state sufficient matter of excuse to justify a replication *de injuria*.

To assumpsit on a bill by the second indorsee against the drawer, a plea of a fraudulent transfer by another party to whom the defendant had indorsed it for the purpose of getting it discounted for him, and that the plaintiff took it with notice; in this case the Court said that the defendant's merely putting his name to the bill

was *prima facie* a promise in law; *Noel v. Rich*, 2 C. M. & R. 360; S. C. 4 Dowl. 228; cited 1 Chitty's Prec. 293.

To assumpsit by the first indorsee against the acceptor of a bill, a plea that the defendant accepted without consideration, and for the accommodation of the drawer, and that it was indorsed when overdue by the drawer for the accommodation of the plaintiff and without consideration; *Griffin v. Yates*, 29 Eng. C. L. Rep. 430.

To assumpsit by the second indorsee of a note against the maker; a plea that the defendant called upon the referee of a fraudulent money lending advertisement in a newspaper, who fraudulently procured the note from him under pretence of getting it discounted, and that there was no consideration between any of the parties, who were all privy to the fraud; *Isaac v. Farrer* 1 M. & W. 65.

To assumpsit by the payee against the maker of a promissory note, a plea that it was given for goods with which the plaintiff was to supply the defendant, and averment that he did not supply them; *Watson v. Wilkes*, 31 Eng. C. L. Rep. 326.

To assumpsit by the indorsee against the acceptor of two bills of exchange, a plea that the defendant accepted the bills for the accommodation of the drawer, and that the drawer gave the plaintiff divers other bills of exchange, and that it was agreed between the drawer and the plaintiff, that in consideration of the premises, the plaintiff should forbear to sue the drawer on the first mentioned bills, until default in payment of the latter; that the said bills were delivered and accepted by the plaintiff in payment of the first mentioned bills, and that the agreement was made without the privity of the defendant; *Reynolds v. Blackburn* 2 Nev. & P. 136; S. C. 6 Dowl. 19. Cited 1 Chitty's Prec. 293.

An improper use of *de injuria* cannot be objected to after verdict; *Banks v. Parker*, Hob. 76; *Collins v. Walker*, Sir T. Raym. 50.

Where the plea is bad for duplicity, it cannot be objected that the replication *de injuria* is bad for putting too many facts in issue, provided it do

Estoppel.

SEC. X. ESTOPPEL.

36. *Plea in Estoppel.*

C. D. }
 ads. } ——— Com. Pleas.
 A. B. }

And the said C. D., defendant in this suit, by G. H., his attorney, comes and defends the wrong and injury when, &c., and says that he, the said plaintiff, ought not to be admitted to say or allege that, [*stating the allegation in the declaration to which the estoppel relates ;*] because he says that, [*here state the matter by which the plaintiff is estopped.*] And this he is ready to verify. Wherefore he prays judgment if the said plaintiff ought to be admitted against his own acknowledgement by his deed aforesaid, [*or otherwise, according to the matter of the estoppel,*] to say or allege that, [*stating as before, the allegation to which the estoppel relates,*] &c.

G. H., Defendant's Attorney.

37. *Replication by way of Estoppel.*

A. B. }
 v. } ——— Com. Pleas.
 C. D. }

And the said plaintiff says that the said defendant ought not to be admitted or received to plead the said plea by him [secondly] above pleaded, as to so much thereof, wherein he alleges that, [*&c., stating the part of the plea to which the estoppel relates ;*] because he says that, [*&c., here state the ground of estoppel, either by the pleadings and verdict in a former suit, or by a bond, &c., and conclude as follows :*] and this he, the said plaintiff, is ready to verify. Wherefore he prays judgment if the said defendant ought to be admitted or received against the said record [*or, "against his own acknowledgement by his deed aforesaid,"*] to plead the plea by him [lastly] above pleaded

not fall within any of the preceding objections; *Reynolds v. Blackburn*, 2 Nev. & P. 36; S. C. 6. Dowl. 19.

Where it is doubtful whether the plea amounts to an excuse or not, it would be generally safer to traverse a particular fact contained in it, than to reply *de injuria*; for though as observed by Lord Abinger in *Isaac v. Farrer*, *supra*, "in every action on a bill or note, a defendant by alleging fraud, or such other circumstances as would throw the proof of value on the indorsee, might compel him to prove it, were he to take issue on any other fact stated in the plea;" yet

this position is questionable; for it seems such a form of pleading would not be an admission on the part of the plaintiff sufficient to raise an inference against him of the existence of facts passing between the defendant and a third person, but only a *waiver of requiring proof*, of those facts which are not denied, the party being content to rest his claim on other facts in dispute; if any inferences are to be drawn by the jury, they must have those facts proved like any others; *Edmunds v. Groves*, 2 M. & W. 643; *Bennion v. Davison*, 3 M. & W. 179.

Executors — Non-Assumpsit — Plene Administravit.

in this suit, that, &c., [*stating and concluding with the allegation in that part of the plea to which the estoppel relates.*]

E. F., Plaintiff's Attorney.

SEC. XI. EXECUTORS.^a38. *Non-Assumpsit.*^b

C. D., Executor
ats. of E. F. } ——— Com. Pleas of the term of ——— A. D. ———.
A. B.

The defendant, executor as aforesaid, by — his attorney, comes and defends, &c., and saith that the said E. F. in his life-time did not promise [*if the declaration contain a count on a promise by the executor, state "that neither the said E. F. in his life-time nor the defendant, as executor as aforesaid, after the death of said E. F., did promise,"*] as in the declaration alleged; and of this the defendant puts himself upon the country, &c.

39. *Plea that the Defendant is not Executor.*

C. D., sued as Executor, &c. } ——— Com. Pleas.
ats.
A. B.

The defendant, by — his attorney, comes and defends, &c., and saith that he never was [*if several defendants, that they were not executors, nor is either of them executor,*] executor of the last will and testament of the said E. F., deceased, nor ever administered [*nor did either of them ever administer*] any of the goods or chattels which were of the said E. F., deceased, at the time of his death, as in the said declaration alleged; and of this the defendant puts himself upon the country, &c.

40. *Plea of Plene Administravit.*^c

Plead Non-Assumpsit, form 38, if the debt can be successfully denied.

The defendant, by — his attorney, saith that the plaintiff his action aforesaid ought not to maintain, because he says that he hath fully administered all

(a) See, in general, Williams on Executors, belongs to it in other cases. It admits the character of executor.

page 1192 to 1228; 2 Selw. N. P. tit. "Executor," ix.; 2 Stark. Ev. tit. "Executor;" Tidd, 9th ed. 644; 1 Chit. G. P. 556. As to when executors are chargeable for rent of premises; and form of pleas, Rubery v. Stevens, 24 Eng. C. L. Rep. 50.

(b) *Non-Assumpsit* in an action by or against an executor has precisely the operation which

(c) If it be denied that the plaintiff is executor, the plea must be special; Rast. Ent. 322 a. 329 b. pl. 10, 330 a; Co. Ent. 144 b; Lil. pl. 427, pl. 27; 6 Wentw. 293.

(d) See Swan's Stat. 356, 357, Secs. 100, 102; 5 Ohio Rep. 72.

Frauds—That Contract is not in Writing.

and singular the goods and estate which were of the said E. F., deceased, at the time of his death, and which have ever come to the hands of the defendant as executor [or, administrator] as aforesaid, to be administered, and that he, the defendant, had not [if several defendants, state they, the defendants, had not, nor had either of them] at the time of the commencement of this suit, or at any time since,* nor hath he [nor have they, nor hath either of them] any goods or estate which were of the said E. F. at the time of his death, in the hands of the defendant as executor [or, administrator, or, executors, or administrators,] as aforesaid to be administered; and this the defendant is ready to verify. Wherefore [&c. *prayer of judgment as ante, p. 641, form 1.*]

41. *Replication that Defendant had Assets.*

[*Title and commencement as ante, page 642, form 5, and then as follows:*] saith that the defendant at the time of the commencement of this suit, had divers goods, chattels and estate, which were of the said E. F., deceased, at the time of his death in the hands of the defendant, as executor as aforesaid, to be administered, of great value, to wit, to the amount of the damages sustained by the plaintiff by reason of the non-performance of the promises in the declaration mentioned, [in debt, to wit, to the amount of the debt in the declaration demanded, and of the damages sustained by the plaintiff by reason of the non-payment thereof,] and wherewith the defendant could and ought to have satisfied the said damages, [or, debt and damages,] and this the plaintiff prays may be inquired of by the country, &c., and the defendant doth the like.

SEC. XII. FRAUD, STATUTE OF.

42. *Plea that the Promise was not in Writing, &c.*

C. D. }
 ats. } ——— Common Pleas.
 A. B. }

And the said C. D., defendant in this suit, by J. S., his attorney, comes and defends, &c., and says that the said plaintiff ought not to maintain his action thereof against him, because he says that by the statute entitled "An act for the prevention of frauds and perjuries," it is enacted that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement

(a) 2 Saund. 216, n. 1.

Husband and Wife—Infants.

upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto, by him or her lawfully authorized. And the said defendant avers that the said plaintiff has brought his said action for the default [*or, debt, or, miscarriage*] of S. M., and for no other purpose whatever, and that the supposed promise and undertaking aforesaid of the said defendant in the said declaration specified, was not and is not, in writing, nor was, nor is, any note or memorandum thereof, made in writing and signed by the said defendant, or any other person or persons thereunto, by the said defendant authorized, as required by the said statute: and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to maintain his aforesaid action thereof against him, &c.

J. S., Attorney for Defendant.

SEC. XIII. HUSBAND AND WIFE.

43. *Non-Assumpsit to a Declaration against Husband and Wife for her Debt dum sola.*

C. D. and E. his wife, }
 ats. }
 A. B. } — Com. Pleas of the Term of —, A. D. —.

The defendants, by —, their attorney, come and defend, &c., and say, that the said E. did not promise, as in the declaration alleged; and of this the defendants put themselves upon the country, and the plaintiff doth the like, &c.

SEC. XIV. INFANCY.

44. *Infancy of Defendant.*

And the defendant, by —, his attorney, [*or, if the defendant be still an infant, state,* by E. F., admitted by the said court here as *guardian* of the defendant to defend for him, he being an infant within the age of twenty-one years;] says, that the plaintiff his action aforesaid ought not to have or maintain, because he says that he, the defendant, at the time of the making of the said promises in the said declaration mentioned, and each of them, was an infant within the age of twenty-one years, to wit, of the age of — years,

(a) Tidd, 9th ed. 99; Arch. by Chit. 4th ed. not the plaintiff, may avail himself by writ of 767; 1 Saund. 117 g, note 1; Chit. jun. Contr. error; 2 Saund. 117 f, note 1, 212 a, 4, 5; Bird 2d ed. 671. The appearance of an infant by v. Pegg, 5 B. & Al. 418; see 5 Ohio Rep. 227. attorney, is error, of which the defendant, but

Infancy.

[*exact age here stated not material;*] and this the defendant is ready to verify; wherefore he prays judgment, &c.

45. *Replication, Denial of Defendant's Infancy.*^b

The plaintiff, as to the said plea, saith he ought not to be barred of his action, because he says that the defendant at the time of the making of the said several promises in the said declaration mentioned, was of the full age of twenty-one years, and not within the age of twenty-one years as in the said plea alleged; and this the plaintiff prays may be inquired of by the country, &c.

46. *Replication that the Action is partly for Necessaries, and nolle prosequi as to the remainder of the demand.*^c

And as to the said plea so far as it relates to the said promises as to the said meat, drink, [*&c. as in declaration*] found and provided by the plaintiff for the

(a) As to infant pleading in person, see ante, 640, note (d.) Non-assumpsit should not be pleaded without good cause for denying that the debt was in fact contracted. The defendant may plead infancy to part, and another plea to the rest of the claim.

(b) Form, &c., 2 Saund. 211. The defendant has, upon this issue, to prove his minority at the time the debt was contracted; see *Borthwick v. Carruthers*, 1 T. R. 648. In an action against a defendant as acceptor of a bill, if the issue be infancy, he must distinctly prove not only his real age, but also (if not shown to have been under age when the action was commenced) the day on which he accepted the bill; and the date of the bill will not be even presumptive evidence of the time of acceptance; *Israel v. Argent*, Exch. 1834, MS.; *Blyth v. Archbold* and others, Guild. July 9, 1835, cor. Lord Abinger, C. B., cited 1 Chitty's Prec. 315. The latter was an action by the drawers against the acceptors of a bill, one of whom pleaded infancy. The midwife and the defendant's tutor proved his birth and identity. Lord Abinger said, the defendant was bound to make out his plea and to show that he was an infant at the time he entered into the contract, viz: at the time of the acceptance. The bill was drawn at six months' date from the 18th of November. It did not appear when the acceptance was writ-

ten, and it might have been after the defendant was of age, as the bill had several months afterwards to run. One of the defendant's clerks was then called, who stated that the bill was left for acceptance between the 2d and 5th of October—that he wrote the words, "accepted, payable at Sir Richard Car Glynn and Co's.," and placed it on Mr. Watson's desk. He never saw the bill afterwards. Lord Abinger said this carried the case a step further, but the defendant ought to prove when he did accept. Verdict for plaintiff. The infancy may be proved by calling some of defendant's family, &c. The register of the birth or christening will not, though it state the time of birth, be evidence of the fact; *Wibben v. Law*, 14 Eng. C. L. Rep. 163; *Rex v. Clapham*, 4 C. & P. 20; 19 Eng. C. L. Rep. 260. The plaintiff may reply denying the infancy as to part, and that as to the remainder of the claim that it was for necessaries or was confirmed after full age, &c., see post.

(c) Form, &c. *Burghart v. Angerstein*, 19 Eng. C. L. Rep. 260, note. As to the law on this subject, see Chitt. jun. Contr. 2d ed. 114 to 124. The nolle prosequi is proper as to a count on a bill of exchange or for money lent or on an account stated, &c., (if in the declaration,) because for such claims an infant is not liable; Chitt. jun. Contr. 2d ed. 122, 123.

Infancy.

defendant, and the said goods sold and delivered by the plaintiff to the defendant [and the said money paid by the plaintiff for the defendant's use,^a] at his request, the plaintiff saith that he ought not to be barred of his said action, &c., because he saith that the said meat, drink, [*&c.*] and goods were, at the times when they were respectively found and provided for and sold and delivered to the defendant respectively^b necessities suitable to the then degree, estate, circumstances and condition of the defendant, [and that the said money so paid for the defendant's use, was so paid by the plaintiff in the purchase of necessities fit and suitable to the then degree, estate, circumstances and condition of the defendant,] and this the defendant is ready to verify; and as to the said plea, as it relates to the residue of the said declaration, the plaintiff saith, that^c he will not further prosecute his action against the defendant as to the residue of the said declaration or any part of such residue, therefore as to the same let the defendant be acquitted and go thereof without day, &c.

47. *Rejoinder;—That the Goods, &c. were not Necessaries.*

And the defendant, as to the said replication to the said plea, so far as it relates to [*&c., as before,*] saith that the said meat, [*&c.*] were not nor was any part thereof necessities suitable to the then degree, estate, circumstances and condition of the defendant, [nor was the said money so paid by the plaintiff, or any part thereof paid by him in the purchase of necessities fit and suitable to the then degree, estate and condition of the defendant,] as in the said replication alleged; and of this the defendant puts himself upon the country, &c.

48. *To a plea of Infancy, that Defendant confirmed his Promise after he became of age.^d*

The plaintiff, as to the said first plea, saith that he ought not to be barred of his action, &c., because he says that the defendant, before the commencement

(a) Insert this if the declaration contain a count for money paid; as an infant is, it seems, liable for money paid for him, for necessities; Chit. jun. Contr. 2d ed. 117.

(b) Need not on issue joined on this averment prove that they *all* were necessities; Tapley v. Wainwright, per Denman, C. J. 27 Eng. C. L. Rep. 101.

(c) Or sometimes it may be better, instead of this *nolle prosequi*, to put the infancy in issue as to the remainder of the claim, if any doubt as to

the fact; or plaintiff may *pro tanto* reply a new promise after twenty-one.

(d) See, in general, Chit. Jun. Contr. 2d ed. 124 to 127. If the defendant traverse the new promise, the plaintiff has to prove it, and defendant must prove he was under age when he made such *subsequent* promise, or the contrary will be inferred; Borthwick v. Carruthers, 1 T. R. 648. If the promise were *conditional* the declaration should, it seems, be framed specially thereon.

Infancy — Judgment Recovered.

of this suit, to wit, on [*&c.*] attained his full age of twenty-one years, and that the defendant after he had so attained his full age of twenty-one years, and before the commencement of this suit,^a to wit, on, [*&c.*,] at, [*&c.*,] by a certain memorandum in writing, then and there made and signed by him, ratified and confirmed the said contracts, and made the said promises in the said declaration mentioned;^b and this the plaintiff is ready to verify. Wherefore he prays judgment, [*&c.*]

49. *Rejoinder denying that Defendant confirmed his Promise after he became of Age.*

C. D. }
ads. } ——— Com. Pleas.
A. B. }

And the said defendant, as to the said replication of the said plaintiff to the said [second] plea of the said defendant, says that the said plaintiff ought not, by reason of any thing by him in that replication alleged, to have or maintain his aforesaid action thereof against him, the said defendant,* because he says that he, the said defendant, did not, after he attained the age of twenty-one years, and before the commencement of this suit, assent to, ratify, or confirm the said several promises and undertakings in the said declaration mentioned, or any or either of them, in manner and form as the said plaintiff hath above in his said replication in that behalf alleged. And of this he, the said defendant, puts himself upon the country. [And the said plaintiff likewise, &c.]

G. H., Defendant's Attorney.

SEC. XVI. JUDGMENT.

50. *Plea of Judgment recovered for the Debt.*

C. D. }
ats. } ——— Com. Pleas of the Term of — A. D. —.
A. B. }

The defendant, by —, his attorney, saith that the plaintiff his action aforesaid ought not to have or maintain, because he says that the plaintiff heretofore, to wit, on the — day of —, A. D. —, in the Court of Common Pleas in and for the county of —, in the state of Ohio, impleaded the defendant in an action on promises, to the damage of the plaintiff of — dollars for the not performing the very same identical promises in the declaration above mentioned, [*or if the judgment in the former action were in debt, say, in an action of debt for the detention of the moneys in the said declaration*

(a) A new promise before writ must be proved. Armstrong, 1 M. & Sel. 724. In *debt*, instead of the words, "and made the said promises,"

(b) See per Lord Ellenborough, *Cohen v.* state "and agreed to pay the said moneys."

Judgment Recovered — Nul Tiel Record.

above mentioned, and for, upon, and in respect of the contracts and causes of action in the said declaration above mentioned,] and such proceedings were thereupon had in the said action, that afterwards, to wit, on [&c.] the plaintiff, by the consideration and judgment of the said [last mentioned] Court, recovered in the said action against the defendant — dollars for his damages which he had sustained on occasion of the not performing the same identical promises in the said declaration above mentioned, as also — dollars for his costs and charges by him about his suit in that behalf expended, [*or if the former action were in debt, state, the said debt or moneys in the said declaration above mentioned, to wit, — dollars, as also — dollars for his damages by him sustained by reason of the detention thereof, as also — dollars for his costs and charges by him about his suit in that behalf expended,*] whereof the defendant was convicted, as by the record and proceedings thereof still remaining in the said [last mentioned] Court fully appears; which said judgment is in full force and unreversed and unsatisfied; and this the defendant is ready to verify by the said record.

51. *Replication of Nul Tiel Record to Plea of Judgment recovered in the same Court.*

The plaintiff saith that he ought not to be barred of his said action, &c., because he saith that there is not any record of the said supposed recovery in the said plea mentioned, remaining in the said Court here, as the defendant hath above alleged; and this the plaintiff is ready to verify, when, where, and in such manner as the Court here shall order, direct, and appoint; wherefore he prays judgment, [&c.]

52. *Replication of Nul Tiel Record to Plea of Judgment recovered in another Court.^a*

The plaintiff saith that he ought not to be barred of his said action, &c., because he says that there is not any record of the said supposed recovery in the said plea mentioned, remaining in the said Court of —, aforesaid, as the defendant hath above alleged; and this the plaintiff is ready to verify, when, where, and in such manner as the Court here shall order, direct and appoint; wherefore he prays judgment, [&c.]

SEC. XVI. LIMITATIONS, STATUTE OF.

53. *Plea of the Statute of Limitations.^b*

[*Plead non-assumpsit, as ante, 659, if there be reason to deny the debt.*] And for a further plea in this behalf the defendant saith [*or, if the statute*

(a) Sometimes Plaintiff should new assign. subject, see Tidd, 9th ed. 14 to 17; Stark. Ev. 2d ed. tit. "Limitations;" Chit. jun. Contr. 2d

(b) Swan's Stat. 553. As to the law on this

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defeat part only of the claim, state, as to the said supposed causes of action, so far as they relate to the sum of — dollars, parcel of the moneys in the declaration mentioned, the defendant saith] that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith, that the said supposed causes of action in the said declaration mentioned, [as to the said sum of — dollars, parcel, &c.,] did not, nor did either of them, accrue to the plaintiff, [omit the words “to the plaintiff,” where the declaration is by the assignee of a bankrupt, executors, &c.,] at any time within [six] years next before the commencement of this suit; and this the defendant is ready to verify.” [Add prayer of judgment, as ante, p. 641, form 1.]

54. *Replication that the Causes of Action accrued within Six Years.**

And as to the said [second] plea, the plaintiff saith, that he ought not to be barred of his said action, &c.; because he saith that the said several causes of action in the said declaration mentioned, and each of them, did accrue to the plaintiff within [six] years next before the commencement of this suit, in manner and form as the plaintiff hath above thereof complained against the defendant; and this the plaintiff prays may be inquired of by the country, &c.

ed. 626 to 656; Ballantine on the Statute of Limitations. Under the English statute, the acknowledgment of a debt, or promise to pay the same, made after an action is barred by the statute, revives the original debt, and an action may be brought in such case for the original debt. But in Ohio, the acknowledgment of a subsisting indebtedness upon a note already barred by the statute of limitations, and a promise to pay the same, although it constitutes a contract which can be enforced, and may be sued on, does not revive and resuscitate the original debt, and, consequently, in such case, the creditor must sue on the subsequent promise; 17 Ohio Rep. 9. If an acknowledgement, or promise, or payment of any part of the principal or interest be made before the action is barred, that is, within the time limited by the statute for the bringing of an action on the original debt, then the debt is revived and suit may be brought on the original contract after such acknowledgment, promise or payment within the period limited generally by the statute; id. ib.; Swan's Stat. 555, §5. If after a debt is barred, the creditor undertakes to recover upon an acknowledgment, payment, &c., made after the debt is barred, he must make out a new promise or undertaking to pay the debt, and not

merely a payment of part or other mere constructive acknowledgment of the original debt; 17 Ohio Rep. 9.

(a) This form applies also in debt. “Did not within, &c., promise, &c.,” is also good in assumpsit in those cases where the promise is to pay money immediately, so that the cause of action accrues immediately after the promise is made; but it is informal and demurrable where the promise is to pay money, &c., at a future day; 1 Saund. 38, n. 2; 283, n. 2; 2 Saund, 63 c, n. 6; Leaper v. Tatton, 16 East, 421.

(b) Defendant may plead payment of money into court as to part of a demand on the common count, and plead the statute as to the remainder; Long v. Greville, 10 Eng. C. L. Rep. 5.

(c) This general replication suffices as well where the original cause of action arose within six years before the issuing of the writ, as where the plaintiff, admitting that the original or first right of suit accrued beyond that period, relies on a subsequent promise or acknowledgment, or by part payment, made within the six years. Such new promise or acknowledgment need not be specially replied; subject, however, to this distinction, that where the declaration charges the original promise as made beyond six years, the plaintiff cannot reply, or on the above

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55. *Replication that Defendant left this State and remained out of the same when the Cause of Action accrued, and was Sued within Six Years next after his return.*

And as to the said [second] plea, the plaintiff saith that he ought not to be barred of his said action, &c., because he says that before the respective times when the said several causes of action accrued, to wit, on [insert time before the alleged cause of action accrued,] at, [&c.,] he, the defendant, left, removed, and departed from the State of Ohio; and at and after the respective times when the said several causes of action accrued, and from the said time when the defendant left this State, he, the defendant, continued and remained out of the same, to wit, at —, in —, until afterwards, to wit, on, [&c.,] when he, the defendant, returned to this State, from said place out of this State, where he had so remained as aforesaid, and which was his first return into this State from the said place out of this State, where the defendant so was and had removed as aforesaid after the said causes of action, and every of them, accrued to the plaintiff; and that he, the plaintiff, commenced this suit within six years next after his, the said defendant's first return into this State; and this the said plaintiff is ready to verify, [&c.; conclude as ante, p. 642, form 5.]

replication sustain his claim on a fresh conditional promise within six years. Where the new promise is *absolute*, in the terms of the original engagement, and made within the period limited, it is sufficient to declare on the original contract and promise; 15 Ohio Rep. 130; 16 East, 420; Upton v. Else, 22 Eng. C. L. Rep. 451; 17 Ohio Rep. 9; see note b, ante, p. 698; and then the above replication suffices; but where the defendant waives the statute conditionally, only, (as if he promise to pay *when able*, or convenient, &c.,) he is liable only if the condition be completed, and the declaration should be framed specially on such new promise. So, where the subsequent promise is made after the original debt is barred, the plaintiff should declare on such promise; 17 Ohio Rep. 9.

When the declaration is upon a note with common counts, and plea of the statute of limitations as to the count on the note and the common counts, with a replication in the above form, the plaintiff may recover under the common counts on a promise to pay the debt, made after suit on the note is barred by the lapse of fifteen years.

It is proper to add, that the general traverse of the plea to a declaration on the original un-

conditional engagement, could not afford the plaintiff an opportunity of resting his case on the conditional promise; and a replication setting up such qualified promise, would be bad, as a departure from a declaration charging the first contract; see the cases, Chit. jun. Contr. 2d ed. 642, 643, 651, 654, 655; Haydon v. Williams, 20 Eng. C. L. Rep. 86. Fraud cannot be set up as an answer to the statute, if the declaration be not founded thereon, and the replication contain a mere traverse of the plea; Clark v. Hougham, 9 Eng. C. L. Rep. 47. Replication of plaintiff's infancy; 2 Saund. 118. Replication that plaintiff obtained a judgment, which was arrested or reversed, and that he now comes within a year after such reversal; 2 Saund. 63 h. Replication in action against husband and wife; Pittam v. Foster; 8 Eng. C. L. Rep. 67. As to note made in another State, see 7 Ohio Rep. 246; 14 do. 437; 16 do. 145. Where the plaintiff replies that the cause of action arose within six years, it is for him to prove the cause of action, and that it accrued originally, or has been recognized by part payment, &c., within six years.

(a) See Swan's Stat. 555, §7.

56. *Replication that the Defendant resided out of the State at the time the Cause of Action accrued, and that Plaintiff Sued within Six Years next after his return.*

And as to the said [second] plea, the plaintiff saith he ought not to be barred of his said action, &c., because he says that before and at the respective times when the said several causes of action accrued, he, the defendant, resided out of the State of Ohio; and at and after the respective times when said several causes of action accrued, he, the defendant, continued to reside out of said State, to wit, at —, in —, until afterwards, to wit, on, [&c.,] he, the defendant, removed and came to this State from said place out of this State, where he had so resided as aforesaid, and which was his first removal into this State from his said place of residence out of this State where he had so resided aforesaid, after the said causes of action, and every of them, accrued to the plaintiff; and that he, the plaintiff, commenced this suit within six years next after his, the said defendant's said first removal and coming into this State, to wit, on, [&c.,] and this the said plaintiff is ready to verify; wherefore he prays judgment and his damages, &c.*

57. *Replication that the Defendant removed to a place unknown to the Plaintiff, and that Plaintiff Sued within Six Years next after his place of Residence became known.*

And as to the said second plea, the plaintiff saith, that he ought not to be barred of his action by reason of any thing in that plea alleged, because he says that [long before, or, say, within six years next after] the respective times when said several causes of action accrued, to wit, on, [&c.,] he, the defendant, removed from his then place of residence, to wit, at —, in —, to a place and parts unknown to the plaintiff, in whose favor alone said causes of action accrued; and that he, the defendant, from the said time when he so removed from his said place of residence [before, or, say, within said six years next after] the respective times when said several causes of action accrued, continued and remained in a place and parts unknown to the plaintiff; and the same was unknown to the plaintiff until a long time afterwards, and after the respective times when said several causes of action accrued, to wit, on, [&c.,] when the place of residence of said defendant, to wit, at —, in —, first then became and was known to the plaintiff, and that he, the plaintiff, commenced this suit within six years next after his, the said defendant's place of residence first became and was known to the plaintiff as aforesaid; and

(a) See Swan's Stat. 555, §7; 9 Ohio Rep. 36.

(b) As to the form of this replication: In the case of *Coventry v. Atherton*, (9 Ohio Rep. 36,) the court say in reference to the 7th section of the statute of limitations: "This seventh sec-

tion provides for three classes of cases: '1. When any person shall have left the State and remained out of the same.' 2. When any person 'shall reside out of the State;' and 3. When any person 'shall have removed to any place unknown to the persons in whose favor a

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this the plaintiff is ready to verify, [*&c.; prayer of judgment, as ante, p. 642, form 5.*]

SEC. XVII. PAYMENT.*

58. *Plea of Payment before Action to part of the Plaintiff's Claim.*

1. *Non assumpsit, nunquam indebitatus, or other appropriate pleas.*] And for a further plea as to the said (promises,) [*in debt say, "debts and causes cause of action may exist."* As to the two former classes, it is enacted that if they shall have thus removed and remained or resided out of the State '*at the time any cause of action shall have accrued against them,*' the person having such cause of action, may commence his suit '*within such time as is limited as aforesaid,*' after their return or removal to the State. The provision is nothing more nor less than this, that the statute shall not begin to run in favor of any person until such person is within the jurisdiction of the State, and in a situation that suit may be prosecuted against him in our own courts.

"As to the other class of cases, there is more difficulty, although probably the intention of the Legislature was the same. The provision is, that if any person '*shall have removed to any place unknown to the person in whose favor such cause of action may exist, during such time as is limited by this act,*' then the person having such cause of action, may commence suit within such time as is limited by the act, '*after his or her place of residence shall become known.*' In the former part of the section, the expression is, '*at the time any cause of action shall have accrued against him,*' in this '*during such time as is limited by this act.*' Upon this clause it might be argued with some plausibility, that if a person against whom a cause of action existed, should abscond and conceal himself, the effect would be not only to destroy the force of the statute from such time until the place of his concealment should become known, but to destroy its force for the time it had already run. It is not necessary, however, in the present case, to give any definite opinion on this part of the section.

"In the case before the court, the replication shows that '*at the time the cause of action accrued,*' the defendant was within the State, and left afterwards. It does not appear that he removed to any place to the plaintiff unknown."

But in the case of *Sulleberger v. Gest, et al.*, 14 Ohio Rep. 206, the court say: "The statute

excepts three classes of cases: 1. When any person shall have left the State and remained out of the same; or, 2. Shall reside out of the same when the cause of action shall have accrued against him, or 3. Shall have removed to any place unknown to the person in whose favor such cause of action may exist, during such time as is limited by this act. In such cases the action may be commenced within such time as is limited by the act, after his or her return to the State — or, if within the State, and if his or her residence is unknown, then within such time after his or her place of residence shall become known.

"It is a maxim of interpretation, that, when the words of a statute are unambiguous, there is no room for construction.

"The statute says, 'If a person remove to parts unknown during such time as is limited by this act, then, after his return to the State — or, if within the State, after his place of residence shall become known, the action may be commenced against him within the time limited by this act.

"If a person then go to parts unknown, during the existence of a cause of action against him, he loses the benefit of the time which may have run in his favor prior to his departure, and gives the entire time, first limited, to the person having a claim against him, within which to commence his suit, after his place of residence shall have become known. There of course must be a removal and change of residence, not a mere temporary absence.

"If a person remove to parts unknown, it matters not whether he goes beyond the limits of the State, or remains concealed or unknown within it; the statute does not commence running in his favor, until his place of residence becomes known. A mere return, in case of removal without the State, is not sufficient, unless the claimant has a knowledge of his residence after such return."

(a) As to the defence of payment and evidence thereon, see *Chit. jun. Contr.* 2d ed. 575 to 589

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of action," so far as they relate to the sum of — dollars,* parcel of the sum in the (first) count of the declaration mentioned; and also to the further sum of — dollars,* parcel of the sum in the (second) count of the declaration mentioned; the defendant says, that the plaintiff ought not to maintain his afore-said action thereof against him, because, he says, that after the (making the promises,) [*in debt say*, "accruing of the said debts and causes of action,"] in the introductory part of this plea mentioned,* and before the commencement of this suit, to wit, on, &c., at [*&c.*, *exact day not material, and it is usual to lay one day, though there have been payments on different days.*] he paid to the plaintiff, and the plaintiff then and there accepted and received from the defendant, divers moneys, to wit, to the amount of — dollars,^b (in full satisfaction and discharge of all the damages by the plaintiff sustained, on occasion of the non-performance of the said promises in the introductory part of this plea mentioned,) [*in debt state*, "in full satisfaction and discharge of the said debts in the introductory part of this plea mentioned, and of the plaintiff's damages by him sustained on occasion of the detention thereof."] And this the defend-

Stark. Erid. 2d ed. "Payment," 595. Payment at a counting-house, when good; *Sanderson v. Bell*, 2 C. & M. 204. As to pleas of accord and satisfaction, see *ante*, 664. A payment may be in goods as well as in money, as for instance, "if a party delivers goods as for a particular amount, together with the balance in money, then the goods would clearly be delivered as a payment *pro tanto*. Whether they were so delivered would be a question for the jury; per *Alderson, B. Canaan v. Wood*, 2 M. & W. 467; and see *Hooper v. Stevens*, 31 Eng. C. L. Rep. 29.

So a payment made to a third party by a tenant, and allowed by a landlord in a written account as so much rent paid to him (the landlord) may constitute sufficient facts to support a plea of payment of that rent; *Walker v. Andrews*, 8 M. & W. 312. And see *Wade v. Wilson*, 1 East, 290.

When debiting in a banker's book amounts to a payment; *Belcher v. Lloyd*, 10 Bing. 310; *S. C.* 3 M. & S. 822; *Ryder v. Walleth*, 7 C. & P. 606.

A check to operate as a payment must be unconditional in its terms; *Hough v. May*, 31 Eng. C. L. Rep. 235.

Payment can be given in evidence under the general issue, whether in whole or in part.

(a) In *Mee v. Tomlinson*, 31 Eng. C. L. Rep. 66, it was held that a plea of payment of a part of several sums mentioned in the declaration, must show to how much of each of those sums the

payment is meant to apply; and in *Marshall v. Whiteside*, 1 M. & W. 189; *Parke, B. says*, that "when the plea amounts to an accord and satisfaction, it may be right to plead it separately to each particular count, but where there is a plea of payment of money into Court, it need not be pleaded to each count, but may be pleaded generally to the whole declaration." On the whole it would be safer, where the plea does not go to the whole of the breaches in the declaration, to show specifically what portions of the money paid are to be applied to each claim.—Care must be taken that the plea be applied only to so much of the promises and moneys laid in the declaration as the sum paid will satisfy. The payment of a less sum than the debt will not in general discharge the debtor's liability to the residue of the demand, although a receipt in full be given, there being no release under seal; see *Fitch v. Sutton*, 5 East, 232; *Chit. jun. Contr.* 2d ed. 531, 578. There is an exception where the payment is made to the plaintiff under a general composition arrangement with defendant's creditors; see *Forms 14 and 15, ante*, 673; and also in the case of a payment made by a third person out of his own moneys, and in a few other instances; see *Chit. jun. Contr.* 2d ed. 578.

(b) The aggregate amount to which the plea of payment is pleaded, should be the amount which the plaintiff can probably prove he has paid; when pleaded to more than the defendant succeeds in proving at the trial, it has been held

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ant is ready to verify;* wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action thereof against him, &c.

J. S., Attorney for Defendant.

59. *Plea of Payment before Action of the whole of Plaintiff's Claim.*^b

And for a further plea in this behalf, [or if the plea be pleaded to one count only, and there be no other plea to that count, see ante, 703, note (a,) say, and as to the said first count,] the defendant says the plaintiff ought not to maintain his said action thereof against him, because, he says, that after the making of the promises [in debt say, "accruing of the said debts and causes of action,"] in the declaration mentioned, and before the commencement of this suit, to wit, on the — day of —, A. D. —, [any day before writ] at [&c.] he paid to the plaintiff divers sums of money, amounting, to wit, to all the moneys in the declaration [or "— count"] mentioned, in full satisfaction and discharge of all the causes and rights of action in (that count) mentioned, which payment the said plaintiff did then and there accept, of and from the defendant, in such full satisfaction and discharge as aforesaid; and this the defendant is ready to verify. Wherefore, [&c., conclude as in the preceding plea.]

60. *Plea to a Declaration containing an indebitatus count, and an account stated; that the debts stated in those two accounts are one and the same sum, and payment of that sum.*^c

1. *Non assumpsit or other appropriate pleas.*] And (for a further plea) as to the sum of — dollars, parcel of the said sum of money in the (first) count

that the plea may be taken *distributively*, and that in such case, the verdict must be entered for the defendant as to the amount proved to be paid, and for the plaintiff as to the residue; *Cousins v. Paddon*, 1 C. M. & R. 547; cited 1 Chit. Prec. 361.

(a) A plea of payment in satisfaction of the damages must conclude with a verification, as it admits a breach, viz. the non-payment on request; *Ensall v. Smith*, 1 C. M. & R. 522; 3 Dowl. 198, S. C.; *Cooper v. Phillips*, 3 Dowl. 195; S. C. 1 C. M. & R. 649; cited 1 Chit. Prec. 361.

Where no time for payment of a debt is provided by the parties, it impliedly accrues due immediately, the consideration for it has attached without demand; for instance, in the case of the sale of goods, where no credit was agreed upon, the price becomes due on the delivery of the goods, and if not then paid, though not demanded, there is in law a breach, and right to (nominal) damages; and in such case the plea should

be as above. Cases may possibly occur, when the declaration contains a special count where the debt was paid immediately it in law accrued due, in strict performance of the defendant's promise, as laid in the declaration; the plea should then be a simple traverse of the breach, concluding to the country; see *Ensall v. Smith*, *ubi supra*; *Dicken v. Neale*, 1 M. & W. 556. In debt the statement of the breach is mere form, and cannot be traversed; *Ashbee v. Pidduck*, 1 M. & W. 564. A plea of payment, therefore, in that form of action, must, as it admits a debt, always conclude with a verification; *Goodchild v. Pledge*, 1 M. & W. 363.

(b) This form has been adopted in practice in cases where there is a doubt as to the proof of the amount paid; see the notes to the last form, which will be for the most part applicable to this.

(c) This form was held good in *Mee v. Tomlinson*. 31 Eng. C. L. Rep. 66. See the notes to form 58, p. 708.

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mentioned, and as to the sum of — dollars, parcel of the said sum of money in the (last) count mentioned, the defendant says that the plaintiff ought not to maintain his aforesaid action thereof against him, because he says that the said sum of — dollars, so found to be due to the plaintiff on an account stated as in the said (last) count mentioned, is the same sum of — dollars, parcel of the said sum of money in the said (first) count mentioned; and that the said two sums of — dollars each, are one and the same debt of — dollars, and not other or different debts of — dollars. And the defendant further says, that after the making the promises in the introductory part of this plea mentioned; [*proceed as in form 58 from the asterisk, observing the notes to that form.*]

61. *Replication denying the payments in satisfaction.*

And the plaintiff, as to the plea of the defendant by him (secondly) above pleaded to the said promises so far as they relate to the said sum of — dollars, parcel, [&c., *following the statement in the introductory part of the plea*] says, that he ought not to be barred of his said action, &c., because he says that the defendant did not pay to the plaintiff, nor did the plaintiff accept or receive^a from the defendant the said sums of money in the said (second) plea mentioned in satisfaction or discharge of the damages by the plaintiff sustained on occasion of the non performance of the said promises in the introductory part of the said (second) plea mentioned [*in debt state "in satisfaction and discharge of the said debts in the introductory part of the said (second) plea mentioned, and of the plaintiff's damages by him sustained on occasion of the detention thereof"*] in manner and form as the defendant hath in the said (second) plea alledged; and this the plaintiff prays may be required of by the country, &c.

62. *Plea of Payment of Debt and Costs to the Plaintiff after action brought, in satisfaction.^b*

1. *Non assumpsit or other plea according to the facts, except as to the sum paid:*] And as to the sum of — dollars, parcel, [&c.,] the defendant says, that the plaintiff ought not *further* to maintain his aforesaid action thereof against him, because he saith that after the commencement of this suit, ["and

(a) Replication, "that defendant did not pay, nor did defendant receive," held, good on special demurrer; *Webb v. Weatherby*, 1 Bing. N. C. 502.

(b) If a plea in bar be founded on any matter arising *after* the commencement of the action, though it be not pleaded after a previous plea, it

has the commencement and conclusion of *actio non ulterius*; and *actionem non* generally would be improper, for that formula is taken to refer in point of time to the commencement of the suit, and not to the time of plea pleaded. *Stephens*,

3d ed. 401.

 Payment of money into Court.

before the plaintiff declared therein as aforesaid," *if such be the fact,*] to wit, on [&c.] at [&c.] the defendant paid to the plaintiff a large sum, to wit, the sum of — dollars, in full satisfaction and discharge of the said cause of action as to the said sum of — dollars, parcel, &c., and of all the damages by the plaintiff sustained on occasion of the non-performance of the said promise as to the said sum of — dollars, parcel, &c., [*or in debt*, "on occasion of the detention thereof,"] and of all the costs and charges of the plaintiff by him incurred and expended in commencing the said action and prosecuting the same to the time of such payment, and the plaintiff then and there accepted and received the said sum of — dollars, in full satisfaction and discharge of the last mentioned cause of action, and damages, costs and charges; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought *further* to maintain his aforesaid action thereof against him, &c.

 PAYMENT OF MONEY INTO COURT.*

 63. *Plea of Payment into Court.*

And the defendant says that the plaintiff ought not *further* to maintain his action, because the defendant now brings into Court the sum of — dollars, ready to be paid to the plaintiff, together with the sum of — dollars, the costs that have accrued; and the defendant further says, that the plaintiff has not sustained damages [*or in actions of debt*, "that he never was indebted to the plaintiff"] to a greater amount than the said sum of, [&c.] in respect of the cause of action in the declaration mentioned, and this he is ready to verify: wherefore he prays judgment, if the plaintiff ought *further* to maintain his action thereof.

 64. *Replication to a Plea of Payment of Money into Court;—That Plaintiff accepts the same in satisfaction.*

The plaintiff as to the said plea accepts and takes out of the said Court the said sum of — dollars, in full satisfaction and discharge of the said causes of action in the declaration mentioned. Therefore, as to such causes of action the plaintiff is satisfied, and he prays judgment for his costs and charges in this behalf, &c.

 65. *Replication to Plea of Payment of Money into Court;—That Plaintiff claims a further sum.*

The plaintiff saith that he ought not to be barred from further maintaining his aforesaid action, because he saith that he hath sustained damages [*or in*

(a) As to paying money into Court, see ante p. 608.

Release.

debt, "that the defendant was and is indebted to him"] to a greater amount than the said sum of — dollars, in respect of the causes of action in the declaration mentioned, and this the plaintiff prays may be inquired of by the country, &c.

SEC. XVIII. RELEASE.

66. *Plea of Release.*

C. D. }
ads. } ——— Com. Pleas.
A. B. }

And the said C. D., defendant in this suit, by A. & R., his attorneys, comes and defends the wrong and injury when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that after the making of the said several promises and undertakings in the said declaration mentioned, and before the commencement of this suit, to wit on the — day of —, in the year — [*the date of the release,*] at, [*&c., the venue,*] aforesaid, the said plaintiff, by his certain writing of release, sealed with his seal, and now shown to the said court here, the date whereof is the day and year last aforesaid, did remise, release, and forever quit claim unto the said defendant, his heirs, executors and administrators, the said several promises and undertakings in the said declaration mentioned, and each and every of them, and all sum and sums of money, then due and owing, or thereafter to become due, together with all and all manner of action and actions, cause and causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, damages, and demands whatsoever, both at law and in equity, or otherwise howsoever, which he, the said plaintiff, then had, or which he should or might at any time thereafter have, claim, allege or demand against the said defendant, for or by reason or means, &c., [*giving the language of the release,*] as by the said deed or writing of release, reference being thereunto had, will fully appear. And this he, the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

A. & R., Defendant's Attorneys.

67. *Replication that the Release was obtained by Fraud.*

Commencement as ante, p. 642, form 5.] Because he says that the said supposed writing of release in the said plea mentioned, was had and obtained from him, the said plaintiff, by the fraud and covin of the said defendant, to wit, at, [*&c. venue,*] and this, [*&c., concluding with a verification.*]

Tender.

68. *Rejoinder that the Release was fairly obtained.*

*Commencement as ante p. 645, form 9 to the *, and then as follows:]* Because he says that the said deed of release in the said [second] plea mentioned, was had and obtained fairly, and not by the fraud or covin of the said defendant, in manner and form as the said plaintiff hath above in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, and the plaintiff doth the like, &c.

J. S., Attorney for Defendant.

SEC. XIX. TENDER.*

69. *Plea of Non-Assumpsit, &c., except as to part, and a Tender of that Sum.*

And the defendant, by —, his attorney, as to all the said several supposed promises in the said declaration mentioned, except as to the sum of — dollars,

(a) See, in general, Com. Dig. and Bac. Ab. tit. "Tender;" 2 Stark. Ev. 2d Ed. tit. "Tender," 778; Chit. Jun. Contr. 2d ed. 616 to 626. A plea of tender is an issuable plea and may be pleaded after time obtained; see *Nonne v. Smith*, 1 H. Bl. 369; *Kilwick v. Maidman*, 1 Burr. 59. Where there is any doubt as to the formality or proof of the tender, the proper course is to plead payment of money into Court, because if defendant fail on his plea of tender, he will have to pay all costs, whereas on the plea of payment of money into Court, the defendant only pays costs up to the time of his plea, if plaintiff take it out and proceed no further; and defendant obtains his costs if plaintiff proceed further after the plea of payment of money into Court. The tender, if pleaded to a special count, admits the contract therein stated; if pleaded to the common count, it is an admission only to the extent of the sum tendered; see *Cox v. Brian*, 3 Taunt. 95. The statute of Ohio, (Swan's Stat. 932,) provides: "That in any action or suit brought on any writing obligatory, promise or contract, for the payment of money, if the defendant, on a plea of tender, shall prove that he did tender payment of the money due on such writing obligatory, promise or contract, at the time and place when by such writing obligatory, promise or contract, he was holden to pay the same, or at any time before the commencement of such action or suit thereon, and shall bring into court the money so tendered, the plaintiff shall not have judgment for more than the money so due and tendered, without costs; and shall pay the defendant his costs. And in any action or suit brought on any writing obligatory, promise or contract, for the payment of any article or thing other than money, or for the performance of any work or labor, if the defendant shall plead that he did tender payment or performance of such writing obligatory, promise or contract, at such time and place, and in such article or articles, work or labor, as by such writing obligatory, promise or contract, he was bound to pay or perform, and if the court or jury shall find that the defendant did tender as alleged in his plea, they shall at the same time assess the value of the property or labor so tendered, and thereupon judgment shall be rendered in favor of the plaintiff, for the sum so found, without interest or cost, unless the defendant shall forthwith perform his contract, or give to the plaintiff such assurance as the court may approve, that he will perform the same within such time as the court shall direct; in which case judgment shall be rendered for the defendant. And in case any article so tendered, be of a perishable nature, it shall, from the time of such tender, be kept at the risk and expense of the plaintiff, provided the defendant take reasonable care of the same."

Tender.

[*the exact sum tendered.*] parcel of the said several sums of money in the said declaration [or, in the said — count] mentioned, says that [he did not promise in manner and form as the plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c. [And for a further plea, except as to the said sum of — dollars, parcel, &c., the defendant saith that [&c.]* And as to the said sum of — dollars, parcel, [&c.,] the defendant says that the plaintiff ought not to maintain his aforesaid action thereof against him, to recover any more or greater damages^b than the sum of — dollars, parcel, &c., in this behalf, because he saith that after the making of the said promises as to the sum of — dollars, parcel, [&c.,] and before the commencement of this suit,^c to wit, on, [*&c. exact day here laid not material.*] at, [&c.] he, the defendant, was ready and willing, and then and there tendered^d and offered to pay to the plaintiff the sum of — dollars,^e parcel, [&c.,] to receive which, of the defendant, he, the plaintiff, then and there wholly refused; and the defendant in fact further saith, that he hath always, from the time of making the said several promises as to the sum of —, dollars, parcel, [&c.,] hitherto been ready to pay and still is there ready to pay the plaintiff the said sum of — dollars, parcel, &c., and he now brings the same into Court^f ready to be paid to the plaintiff if he will accept the same; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action against him to recover any more or greater damages than the said sum of — dollars, parcel, &c., in this behalf, &c.

70. *Replication to a Plea of Non-assumpsit, &c., and Tender;—Denial of the Tender.*^g

And the plaintiff as to the said plea of the defendant as to all the said several supposed promises in the said declaration mentioned, except as to the sum of

(a) Plead non-assumpsit as above, if the defendant deny that the remainder of the demand ever existed—or plead any special defence, with or without non-assumpsit, according to the facts; but care must be taken not to plead *as to the sum tendered*, any other plea than the plea of tender; see 1 Saund. 33 c, note; Dowgall v. Bowman, 8 Wils. 145; 2 Bla. R. 723, S. C.; Maclellan v. Howard, 4 T. R. 194; otherwise a demurrer will hold.

(b) See 1 Saund. 33 b, note.

(c) "Exhibiting" the bill would not be proper, but if issue were taken, would mean "issuing the writ."

(d) An actual tender must be averred in general. *Semble*, however, where the plaintiff expressly dispensed with the actual production of the money, (See Chit. Jun. Contr. 2d ed. 620;

Fiuch v. Brook, 5 M. & Sc. 70; 1 Bing. N. C. 253,) the plea should specially allege such dispensation or discharge after alleging a readiness at all times, and that defendant was about to tender, &c.

(e) A tender of a *larger* sum may be proved to support this allegation; Dean v. James, 4 B. & Ad. 548; 1 N. & M. 393, S. C.

(f) The sum tendered must be paid into Court, or plaintiff may sign judgment as for want of a plea as to the sum tendered, but not for the residue of the demand stated in declaration. Money deposited in Court in lieu of bail cannot be transferred to the account of a payment into court on a plea of tender.

(g) If the tender be not denied, but plaintiff proceed for a further sum, he may confess he is satisfied as to the sum tendered, see form —

Tender.

— dollars, parcel, [&c.] and whereof the defendant hath put himself upon the country, doth the like [*as the case may be.*] And as to the said plea of the defendant as to the said sum of — dollars, parcel, [&c.] the plaintiff says that he ought not to be barred from maintaining his aforesaid action against the defendant to recover further damages than the said sum of — dollars, parcel, &c., because he saith that the defendant did not tender or offer to pay to him the said plaintiff the said sum of — dollars, parcel, &c., as above alleged; and this the plaintiff prays may be inquired of by the country, &c.

71. *Replication;—A demand of the Debt before the Tender.**

And the plaintiff as to the said plea as to the said sum of — dollars, parcel, &c., saith that he ought not to be precluded from maintaining his said action to recover further damages than the said sum of — dollars, parcel, &c., because he saith that the defendant was not always, from the time of making the said promises as to the said sum of — dollars, ready and willing to pay the said sum of — dollars, parcel, &c., to the plaintiff, as in the said plea alleged, in this, to wit, that * after the making of the said promises as to the said sum of — dollars, parcel, &c., and after the time when the said causes of action in the said declaration mentioned accrued to the said plaintiff in respect thereof, and before the said defendant did tender and offer to pay the same as aforesaid, to wit, on, [&c.] at, [&c.] the plaintiff demanded the said sum of — dollars, parcel, &c., of and from the defendant, and then and there requested him to pay the same unto the said plaintiff, but the defendant did not nor would then pay the same or any part thereof unto the said plaintiff, but then and there wholly neglected and refused so to do, and therein made default, by reason whereof the said plaintiff then and there sustained damages by reason of the non performance of the said promises as to the said sum of — dollars, parcel, &c., in manner and form as he the said plaintiff hath above in his said declaration in that behalf alleged, and this the said plaintiff is ready to verify; wherefore he prays judgment and his full damages by him sustained by reason of the non performance of the said promises as to the said sum of — dollars, parcel, &c., to be adjudged to him, &c.

ante, 706. The above replication puts defendant on proof of a strictly legal tender of the sum.— The plaintiff may take the sum out of Court at once, though he deny the tender.

(a) By the English law, a prior demand and refusal of the identical sum tendered defeats the

tender, because it negatives that defendant was always ready to pay; see 1 Saund. 386, note 2; Bul. N. P. 151; Clit. jun. Contr. 2d ed. 623, 624; *infra*, note (a). This is the law in Ohio, unless our statute cited in a preceding note has changed it.

Tender.

72. *Replication to a Plea of Tender of part of a Bill of Exchange—Showing a prior demand of the amount of the Bill.*^a

Declaration against Drawer of Bill for 400 dollars, with common Count—Plea as to 200 dollars, parcel of moneys in the two counts, a Tender; and other pleadings to the residue. Replication to Plea of Tender as follows:— And as to the said plea of the defendant by him above pleaded as to the said sum of 200 dollars, parcel, &c., the plaintiff says that he ought not to be barred from maintaining his aforesaid action thereof against the defendant to recover further damages than the said sum of 200 dollars, parcel, &c., because he says that the said sum of 200 dollars, which was so tendered and offered to be paid by the defendant as aforesaid, was parcel of the sum of money specified in the bill of exchange in the first count of the said declaration mentioned, and that the defendant was not always from the time of the making of the said promise and the accruing of the said cause of action in the said declaration mentioned as to the said sum of 200 dollars, parcel of the said sum of money in the said bill of exchange specified, and in respect of which the said sum of 200 dollars was so tendered and offered to be paid as aforesaid, ready and willing to pay the said sum of 200 dollars, parcel of the said sum of money in the said bill of exchange specified, and in respect of which the said sum of 200 dollars was so tendered as aforesaid to the said plaintiff in manner and form as the defendant hath in his said last mentioned plea in that behalf above alleged, but on the contrary thereof the plaintiff says that after the making of the said promise in the said declaration mentioned as to the said sum of 200 dollars, parcel of the said sum of money in the said bill of exchange specified, and in respect of which the said sum of 200 dollars was so tendered as aforesaid, and after the time when the said cause of action in respect thereof as in the said declaration mentioned accrued to the plaintiff, and before the defendant did tender and offer to pay the said sum of 200 dollars as in his said plea in that behalf above alleged, and after the said bill in the said first count mentioned became due and payable, according to the tenor and effect thereof, and after the same had been presented to the said J. R. [*the acceptor*] for payment thereof, and after he had refused to pay the same, and after the defendant had had notice thereof, to wit, on, [*&c.*] at, [*&c.*] and on divers other days and times between that day and the time of making the said tender and offer to pay as in the said last mentioned plea alleged, and whilst the amount of the said bill of exchange remained due and unpaid, payment of the said bill was duly demanded by the plaintiff of the defendant, but that the defendant did not then and there or at any other time pay the amount thereof to the plaintiff, but on the contrary thereof then and there wholly neglected and refused so to do; and this he the plaintiff is ready to verify; wherefore he prays judgment and his damages by him sustained by reason of the non performance of the said promise as to the said sum of 200 dollars, parcel, &c., to be adjudged to him, &c.

(a) See *Hume v. Poploe*, 8 East, 168; *Rivers v. Griffith*, 5 B. & Ald. 630, and preceding note.

Usury.

73. *Replication of a demand of the sum tendered after the tender.*

As in form 71, to the asterisk:] After the making of the said tender, and before the commencement of this suit, to wit, on, [&c.] at, [&c.] he the plaintiff demanded of and requested the defendant to pay him the plaintiff the said sum of — dollars, parcel, &c., but the defendant then and there wholly refused, and hath thence hitherto wholly refused, to pay the same, or any part thereof, to the plaintiff; and this [*conclude as in form 71.*]

SEC. XX. USURY.

74. *Plea that a Bill of Exchange was discounted by a Bank for a greater rate of interest than six per cent.**

(a) See form, Wilcox, 141, which is taken from the case of *Chillicothe Bank v. Swayne et al.* 8 Ohio Rep. 257. The plea is not entirely applicable to the present law relating to the State and other Banks, chartered in 1845; 43 vol. Stat. 49, sec. 61. For the cases relating to usury, see 11 Ohio Rep. 417, 489, 498; 13 Ohio Rep. 107, 250; 6 Ohio Rep. 45; 3 Ohio Rep. 17; 14 Ohio Rep. 428; 16 Ohio Rep. 469; 10 Ohio Rep. 378; 12 Ohio Rep. 544; 17 Ohio Rep.

The present statute in relation to interest taken by Banks, above referred to, after providing that they may take, reserve, receive and charge, on any loan, discount, note or bill, at the rate of six per centum per annum, on the amount of the note, bill, &c., so discounted, and no more, in advance, or, according to Rowlett's tables, proceeds thus: "and the knowingly taking, reserving or charging, on any debt or demand payable to such company," a greater rate, "shall be held and adjudged a forfeiture of such debt or demand; but the purchase, discount or sale, of a bill of exchange, payable at another place than the place of such purchase, discount or sale, at the current discount or premium, shall not be considered a taking, reserving or receiving interest; provided no agreement or understanding shall be made that the same shall be paid at any other place than that at which it is made payable."

Under this section, if a Bank knowingly takes, reserves, charges or receives, more than six per cent. interest, the debt is forfeited in the following cases, namely:

1. If the discount was made upon, or by the

purchase of, a promissory note, or any other instrument than a bill of exchange.

2. If the discount was made upon, or by the purchase of, a bill of exchange payable at another place than the place of such discount or purchase, with an agreement or understanding that the bill might be paid at another place than that at which it is made payable.

3. If the discount was made upon, or by the purchase of a bill of exchange, payable at another place, and the Bank charged for the difference in exchange, an amount beyond the current difference in exchange. Thus, if a good bill of exchange at Springfield, Clark county, payable in Cincinnati, is worth less by one-fourth of one per cent. than its face, and a bank at Springfield discount it at one-half of one per cent., the transaction is usurious and the debt forfeited.

The provision, in terms, restricts banks in their purchases and sales of, and discounts and loans upon, bills of exchange, payable at another place, to the CURRENT RATE OF DISCOUNT, if the bill is worth less than par, and to the CURRENT RATE OF PREMIUM if worth more than par. Nothing, however, is more common than for banks to sell their bills of exchange on New York at a premium, and to discount or purchase bills on New York at par. The Bills of Exchange which they sell at a premium, are paid by the proceeds of the bills which they discount or purchase, without allowing the current premium. When a bill payable in New York has been purchased or discounted, without the allowance by the bank of a premium, and it is not paid, it is usual for the bank to charge the cur-

Plea Puis Darrein Continuance.

75. *Plea puis darrein continuance.*

C. D. }
 ads. } ——— Com. Pleas. In Assumpsit.
 A. B. }

And now at this day, to wit, on the — day of —, in the year of our Lord one thousand eight hundred and —, before this court, held at the court house in the [town] of —, in and for the county of —, aforesaid, comes the said defendant by G. H., Esquire, his counsel, and says that the said plaintiff ought not further to maintain his aforesaid action thereof against him, the said defendant, because he says that, after the making of the said several supposed promises and undertakings in the said declaration mentioned, and after the last continuance of the plea aforesaid, [that is to say, after the — day of —, [the last day of the preceding term,] last past, from which day until now, the action aforesaid is continued,] and before this day, to wit, on, &c., at, &c., [here state the matter of the defence,] and this he, the said defendant, is ready to verify. Wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him, &c. [*Annex affidavit of verification, as to a plea in abatement, ante p. 649.*]

rent premium or exchange, upon its payment or renewal; for, then it is understood that the proceeds of the bill was worth more than par. But if it was not worth, when purchased or discounted, more than par, and, when due, the current discount or premium remains unchanged, then this charge of premium is excess; on the other hand, if this charge of premium is the just and current premium on such bill, then it is evident the bank did not, by purchasing or discounting the bill at par, allow the current premium.

But, after all, it may be said that the current value of a bill of exchange payable in New York, is fixed by the rate paid by banks, and not by

the rate at which banks sell their own bills of exchange on New York.

The construction of this section of the charter of the State Banks, however, is of little consequence, as it has been, for all practical purposes, abrogated by an amendment, which prevents the debtor from setting up the forfeiture when sued for the debt, and the bank escapes all forfeiture unless the debtor will run the hazard of a suit against the bank; in which case, if he fails, he pays all costs, and if he succeeds, the forfeiture goes exclusively to the use of common schools; 46 vol. Stat. 92, sec. 4.

CHAPTER VI.

PLEAS, REPLICATIONS, &c., IN DEBT.

SECTION I. GENERAL DIRECTIONS.

1. Plea of the general issue with notice of set-off and failure of consideration.
2. Plea of non est factum not craving oyer with affidavit denying the execution of the deed.
3. Plea of non est factum craving oyer.
4. Pleas of non est factum and nil debit to debt on bond and simple contract.
5. Onerari non.

II. ACCORD AND SATISFACTION. See pleas in assumpsit ante p. 644.

III. ADMINISTRATOR.

6. Plea of nil debit by an executor or administrator. See also pleas in assumpsit ante p. 679.

IV. ARBITRATION AND AWARD.

7. Plea no award made.
8. Replication setting forth award and assigning breaches.
9. Plea setting forth award and stating plaintiff's non-performance of a condition precedent.

V. BAIL BONDS.

10. Plea that there was no writ in the original action.
11. Plea that the bond was not assigned by the sheriff.
12. Plea that the bail was not put in and perfected.
13. Replication thereto;—nul tiel record.

VI. BONDS.

14. To debt on money bond, &c., plea of payment according to the condition, (ad diem.)
15. Plea of payment, (post diem,) in such case.
16. Replication to plea of payment post or ad diem.
17. Plea that a new injunction bond had been substituted in the place of the one sued upon.
18. Non damnificatus.
19. To debt on bond (not assigning a breach) conditioned to perform the covenants in another indenture — Plea of performance thereof.
20. Plea of general performance in like case.

21. Plea of performance of a bond conditioned to indemnify or to do some collateral act other than the payment of money, no breach of the condition being assigned in the declaration.
22. Plea in excuse of performance, that defendant was ready and willing to have produced a good title upon the plaintiff's paying the purchase money, but that the plaintiff discharged him.
23. Plea of non-performance by plaintiff of a condition precedent.
24. Plea in a suit upon a bond in error that, puis darrein continuance, the debt was levied by fi. fa. on the principal.
25. Replication to plea of performance conditioned for C. F.'s duly accounting as clerk, that E. F. received moneys which he did not account for.
26. The like replication stating several breaches.
27. Replication to a plea of performance assigning a breach according to the statute, no breach being assigned in the declaration.
28. Suggestion of breaches on the record under the statute, when no breaches are assigned in the pleadings.
29. Another form in the like case, where the plaintiff has declared for the penalty alone, and oyer has been craved of the condition, and the condition set forth upon plea of non est factum.

VII. COVERTURE.

30. Plea of coverture to debt on bond.
31. A like plea to debt on simple contract.

VIII. DEVISEE.

32. Plea of rien per devise.
33. Replication that the devisee had assets.

IX. DURESS.

34. Plea of duress of imprisonment.
35. Replication defendant at large.
36. Plea of menace to kill, &c.
37. Replication that defendant freely executed the deed.

X. ESCAPE.

38. Plea to debt for an escape from execution against the sheriff—fresh pursuit and re-capture.
39. Replication that the suit was brought before the re-capture.
40. Plea that the prisoner forcibly escaped and has returned.
41. Replication that escape was voluntary.

42. Plea that the prisoner was discharged with the plaintiff's consent.
43. Replication to plea of forcible escape, &c., that the plaintiff sues for another and second escape.
- XI. ESCROW.
 44. Plea that the bond was delivered as an escrow.
- XII. EXECUTOR, references to forms and directions. •
- XIII. FRAUD.
 45. Plea that the speciality was obtained by fraud.
 46. The like plea to debt on simple contract.
 47. Replication to plea that speciality was obtained by fraud.
 48. Plea of the statute of frauds—directions.
- XIV. HEIRS.
 49. Plea rien per descent.
 50. Replication that the heir had assets.
- XV. HUSBAND AND WIFE. Directions and references.
- XVI. INFANCY.
 51. Plea of infancy.
- XVII. JUDGMENT.
 52. Plea of nul tiel record.
 53. Replication that there is a record of a judgment, where it was recovered in another court.
 54. A like replication, where the judgment was recovered in the same court.
 55. To debt on judgment—plea that the same was satisfied by the plaintiff taking the defendant in execution on a ca. sa. issued thereon.
- XVIII. LEASES.
 56. Plea that no rent is in arrear.
 57. Plea—eviction,
 58. Replication denying the eviction.
- XIX. RECOGNIZANCE.
 59. Plea that recognizance was taken without authority.
- XX. TENDER.
 60. Plea of tender to debt on simple contract.
 61. Replication to, denying the tender.

SEC. I. GENERAL DIRECTIONS.

The form of the commencement and conclusion of a plea, replication, &c., in Debt, has already been given in a preceding chapter.

General Issue and Notice.

The body of the pleas in Assumpsit, given in the preceding chapter, are in general applicable in debt. Where, however, the "promise" stated in the declaration, is referred to in the plea in assumpsit, the word "contract," (when the suit in debt is on simple contract,) or the word "deed," (when the suit is on a sealed instrument,) as the context may require, should, in general, be substituted in debt for the word "promise."

1. *Plea of the General Issue in Debt,* nil Debet, with notice of Set-off and of failure of the Consideration.*

C. D. }
ats. } ——— Com Pleas. In Debt.
A. B. }

And the said C. D., defendant in this suit by H., his attorney, comes and defends the wrong and injury when, &c., and says that he does not owe the said sum of money above demanded, or any part thereof, as the plaintiff hath above thereof complained against him. And of this he puts himself upon the country, and the said plaintiff doth the like, &c.

G. H., Attorney for Defendant.

Notice of Set-off.

The plaintiff will also take notice that the defendant, on the trial of this cause, will give in evidence that the plaintiff, at the commencement of this suit, was and still is indebted to the defendant in the sum of — dollars, for the price and value of goods before that time bargained and sold by the defendant to the plaintiff, at his request; and also in the sum of — dollars, for the price and value of goods before that time sold and delivered by the defendant to the plaintiff, at his request; and also in the sum of — dollars, for the price and

(a) The general issue nil debet, to debt on simple contract, is a good plea in all cases where nothing was due to the plaintiff at the commencement of the suit; Com. Dig. Pl. 2 W. 17. And therefore, under this plea, the defendant may give in evidence, performance, release, or other matter in discharge of the action; 1 Ld. Raym. 566; 1 Tidd's Pr. 648. The defendant, also, by this plea, puts the plaintiff upon showing the existence of a legal contract: Id. Ib. But tender and the statute of limitations must be specially pleaded; Id. Ib.

If there be an off-set, notice thereof must be annexed to the plea.

When a deed or specialty is but inducement to the action, and matter of fact the foundation of it, nil debet is a good plea; 11 Johns. Rep.

474; 2 Hill, (N. Y.) 232; 1 Tidd. Pr. 649; as in debt for rent upon an indenture or for an escape. But where the deed or record is the foundation of the action, although extrinsic facts are alleged, nil debet is not a good plea: Id. Ib. And see Com. Dig. Pl. 2 W. 17; 1 Saund. 38; 2 Saund. 187a, note.

If, instead of demurring, the plaintiff joins issue upon an improper plea of nil debet in an action of debt upon a sealed instrument, it seems it will put him to proof of every material allegation in the declaration; 2 Hill, (N. Y.) 232; 1 Cowen, 670.

Nil debet is a good plea in debt on a justice's judgment from Pennsylvania, as the justice's court of that state is not a court of record; 5 Ohio Rep. 545.

General Issue and Notice.

value of work before that time done, and materials for the same, provided by the defendant for the plaintiff, at his request; and also in the sum of — dollars, for money before that time lent by the defendant to the plaintiff, at his request; and also in the sum of — dollars, for money before that time received by the plaintiff, for the use of the defendant; and also in the sum of — dollars, for money found to be due from the plaintiff to the defendant, on an account before that time stated between them; and that the defendant will set off, on said trial, so much of the said several sums of money, so due and owing from the plaintiff to the defendant, against any demand of the plaintiff to be proved on said trial, as will be sufficient to satisfy such demand and indebtedness; and will also demand a judgment against the plaintiff, for the balance of said several sums of money due the defendant, according to the statute in such case made and provided.

*Notice that the Consideration has Failed.**

The plaintiff will further notice that the defendant will give in evidence, on the trial of the above cause, that the plaintiff, in consideration that the defend-

(a) The statute provides, (Swan's Stat. 685, § 136) "that in any action founded upon any specialty, or other written contract, for the payment of money, or the delivery of property, the defendant, by special plea, or by notice attached to, and filed with the plea of the general issue, may allege the want or failure of the consideration, in the whole, or in any part thereof, of such specialty or other written contract, as aforesaid. And if any specialty or other written contract for the payment of money, or delivery of property, is alleged by either party, in any other stage of the proceedings, the other party may aver in answer, and prove on the trial, the want or failure, in the whole or in part, of the consideration of such specialty, or other written contract, as aforesaid. And whenever such specialty, or other written contract for the payment of money, or delivery of property, shall be given in evidence in any court, by either party, without being pleaded, the other party may prove the want or failure of the consideration, in the whole, or in part, of such specialty, or other written contract, as aforesaid: provided, that nothing in this section contained shall be construed to affect or impair the right of any bona fide assignee or assignees of any specialty, or other contract in writing, made negotiable by the law of this State, when such assignment was made before such instrument became due."

Hitchcock, J., says, in the case of *Baker v. Thompson*, 16 Ohio Rep. 508, that "the construction which has been put by this court upon

the act of February 24, 1834, allowing a defendant to an action upon a written contract for the payment of property or money, to plead or give notice of the entire or partial failure of consideration, is this: if the defendant relies upon entire failure, he must so make his proof. If he relies upon partial failure, he must by his proof show wherein this partial failure consists. It is not enough that he proves that the consideration is less valuable than it was supposed or estimated to be, when the contract was made. If the law were to be so construed, it would be of no use to fix any value upon the property or labor or whatever might be the consideration of the note, bond, or contract, for this value might be varied by the proofs, or by the verdict of a jury. Besides, if the vendee of an article might prove that the article was of less value than the contract price, the vendor ought to be permitted to prove that it was more valuable. Such was never the intention of the law. To avail himself of this law, a defendant must show that the consideration is entirely valueless, or if the defence is partial failure, then he must prove that part of the consideration which is claimed to have failed, was entirely valueless.

"For instance, a note is given, the consideration of which is one thousand barrels of flour, at a stipulated price per barrel. No part of the flour is delivered. Here would be an entire failure of consideration. If but five hundred barrels are delivered, there is a partial failure of consideration to this extent. But the maker of

General Issue and Notice.

ant would make and execute to him the promissory note in the declaration described, promised and agreed with the defendant to deliver to the defendant, within ten days after the date thereof, two hundred barrels of superfine flour at the warehouse of the defendant in —, at said county, being at the price and rate of four dollars per barrel; and that defendant accordingly made the said note, and the same was not given for any other consideration whatsoever. That said period for the delivery of said flour has long since elapsed, and defendant did not, within said ten days, nor has he at any time since, delivered said two hundred barrels of flour, or any part thereof to the defendant, at his said warehouse or elsewhere, but has wholly neglected and refused so to do; wherefore the consideration of said note hath wholly failed.

G. H., Attorney for Defendant.

*Affidavit denying the execution of the Instrument.**

If the suit is on a promissory note or bill of exchange, follow the form in *assumpsit*, ante p. 661, using the words "nil debit" where the words "non assumpsit" occur in that form.

If the suit is on a sealed instrument, and the defendant desires to put the plaintiff to proof of the signature, he must plead *non est factum*, and annex an affidavit to that plea, as in the next form.

2. *Plea of non est factum not craving Oyer — Affidavit of the truth of the plea.*

C. D. }
ads. } ——— Com. Pleas. In Debt.
A. B. }

And the said C. D., defendant in this suit, by G. H., his attorney, comes and defends the wrong and injury when, &c., and says that the said supposed writing obligatory [*or, indenture, or, articles of agreement, &c., according to the fact,*] is not his deed, &c. And of this he puts himself upon the country. [And the said plaintiff doth the like, &c.] [*Add notice of set off as ante, p. 717.*]

G. H., Defendant's Attorney.

the note cannot rely upon the defence, that there was a partial failure of consideration, and sustain the same by proof, that the flour was of less value than the contract price."

(a) See the statute, ante p. 662, note.

(b) The plea of *non est factum* in an action of debt, puts in issue the execution of the deed only; it admits all of the material averments in the declaration, 7 Wend. 194; 1 Ohio Rep. 330. 5 id. 109, 240; 6 id. 35. To debt on bond or

speciality if the defendant deny the validity of the obligation ab initio, he may either plead *non est factum*, and give the matter of his defence under it, or he may plead it specially. 1 Chitt. Pl. 519.

Thus, under this plea, the defendant may show that the deed, bond, or speciality, was void ab initio, as having been obtained by fraud; 5 Co. 719; see 2 Wils. 341, 347; 12 Johns. Rep. 387; 13 Id. 430; or that the obligor was a feme cov-

General Issue and Notice — Affidavit.

*Affidavit denying the execution by the Defendant of the Bond or other sealed instrument sued on.**

The State of Ohio, — County, ss.

I, C. D., the defendant in the above mentioned cause, do make solemn oath that the above plea and the matters therein set forth, are true in substance and in fact.

[Signed] C. D.

Sworn to and subscribed, this [&c.]

Affidavit annexed to the plea of Non est Factum, when the defendant denies the signature of a third person.

The State of Ohio, — County, ss.

I, C. D., the defendant in the above mentioned cause do make solemn oath and say, that I verily believe that the deed upon which this action is founded, and mentioned and described in the plaintiff's declaration as being the deed of G. H., is not in truth and in fact the deed of the said G. H., who is charged in this suit as the obligor [or grantor] thereof.

[Signed] C. D.

Sworn to and subscribed, this [&c.]

3. *The like, craving Oyer.*

C. D.,
ads. } — Common Pleas. In Debt.
A. B. }

And the said C. D. comes and defends, &c., and craves oyer of the said *supposed* writing obligatory, in the declaration mentioned, and it is read to him, &c.; and he also craves oyer of the condition of the said *supposed* writing obligatory, and it is read to him in these words: [*Here set out the recitals and condition, verbatim.*] which being read and heard, the said C. D. says that the said *supposed* writing obligatory is not his deed; and of this he puts himself upon the country, &c.; and the said plaintiff doth the like, &c.

G. H., Defendant's Attorney.

ert; 2 Campb. 272; 12 Johns. Rep. 338; or a lunatic; 2 Strange 1104; or made to sign it when drunk; 3 Campb. 83; 2 Ohio Rep. 7; or that it became void after it was made and before the commencement of the action by erasure, alteration, cancelling, &c.; 5 Co. 119 b, 120; 1 Tidd's Pr. 650; or that it was delivered as an escrow upon conditions which have not been performed. 4 Esp. Rep. 255.

But when the defence consists of evidence which, admitting the validity of the specialty, shows that it has been discharged, it must be

specially pleaded. 1 Chit. Pl. 519. The defendant must plead specially, infancy; 5 Co. 119 a; 12 Johns. Rep. 338; duress per minas, 2 Inst. 482; payment at the day (*solvit ad diem*); Ball. N. P. 172; payment after the day (*solvit post diem*); 7 East, 160; performance of the condition or any excuse of performance; 1 Tidd's Pr. 651; accord and satisfaction, the statute of limitations, release, a former recovery, and a tender; 1 Chitt. Pl. 485.

(a) For the statute see ante, p. 662, note.

4. *Non est factum, and Nil Debit, to Debt on Bond, and Simple Contract.*

C. D. }
 ads. } ——— Common Pleas. In Debt.
 A. B. }

And the said C. D. comes and defends, &c., and as to the said first count of the said declaration, says, that the said supposed writing obligatory therein mentioned, is not his deed; and of this he puts himself upon the country, &c.; and as to the second, third and last counts of the said declaration, the said C. D. says that he does not owe the said sums of money therein mentioned, nor any of them, nor any part thereof, in manner and form as the said A. B. hath complained against him; and of this he puts himself upon the country, &c.; and the plaintiff doth the like, &c.

G. H., Defendant's Attorney.

5. *Onerari non.*

And the said C. D. comes and defends, &c., and says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says, [*&c.; here state the ground of defence;*] and this he is ready to verify; wherefore he prays judgment, if he ought to be charged with the said debt by virtue of the said supposed writing obligatory, &c.

SEC. II. ACCORD AND SATISFACTION.

See Pleas in Assumpsit; and for commencement and conclusion of Pleas, &c., in Debt, see ante, and p. 640.

SEC. III. ADMINISTRATORS.

For the commencement and conclusion of the Plea, see next form. See Pleas in Assumpsit, ante, p. 679.

(a) It is said that when the plea admits the "*actionem non*," but where the validity of the deed is disputed, the defendant should say, "*onerari non debet*;" 1 *Reand.* 290, n. 3. matter subsequent, the defendant should say,

Arbitration and Award.

6. *Plea of Nil Debit, by Administrator and Executor.*

C. D., administrator [or, executor]
 of G. H., deceased, } ——— Com. Pleas. In Debt.
 ats.
 A. B. }

And the said administrator [or, executor] as aforesaid, by E. F., his attorney, comes * and defends the wrong and injury, when, &c., and says that he doth not detain the said sum of money above demanded, or any part thereof, as the said plaintiff hath complained; and of this he puts himself upon the country, &c.; and the plaintiff doth the like, &c.

E. F., Attorney for Defendant.

SEC. IV. ARBITRATION AND AWARD.

7. *Plea no award made.*

Actio non, craving oyer of the bond and condition, for the performance of award, as post, 725.—Because he says, that the said arbitrators, named in the said condition, did not, nor did any two of them, on or before the said — day of — A. D. — mentioned in the said condition, make any award in writing under their hands, or the hands of any two of them, [*this must be according to the averment in the declaration,*] of and concerning the premises in the said condition mentioned, and so referred as aforesaid, ready to be delivered to the said parties in difference. And this, [*&c.—Conclude with a verification, as ante, 641.*]

8. *Replication setting forth award and assigning breaches.*

Precludi non, as ante, 642.—Because he saith, that the said E. F. and G. H. the said arbitrators in the said condition of the said writing obligatory mentioned, after the making of the said writing obligatory, and within the time limited and appointed by the said condition for the making of their award of and concerning the premises, that is to say, on, [*&c.*] at, [*&c., venue*] aforesaid, having taken upon themselves the burthen of the said arbitrament, did in due manner make their award in writing under their hands, of and concerning the premises in the said condition mentioned, and thereby referred to them by the said plaintiff and defendant ready to be delivered to the said parties in difference, or such of them as should require the same, by which said award they the said E. F. and G. H. the arbitrators aforesaid, did then and there award and order, [*&c. Here set forth the whole award verbatim, in the past tense.*—Of which said award the said defendant afterwards, to wit, on the said [*&c.*] at, [*&c. venue*] aforesaid, had notice. Nevertheless the said plaintiff in

Arbitration and Award.

fact saith, that the said defendant did not, [*&c. Here state the defendant's breach of the award, according to the facts of the particular case, and which may be as in the declaration, ante 236, and if there have been several breaches of the award, state the second or other breach as follows:*—And for assigning a further breach of the said award, according to the form of the statute in that case made and provided, the said plaintiff in fact further saith, that, [*&c. Here state the other breach, and conclude as follows:*—And this the said plaintiff is ready to verify; wherefore he prays judgment and his debt aforesaid, together with his damages by reason of the detention thereof, to be adjudged to him, &c.

9. *Plea setting forth award and stating plaintiff's non performance of a condition precedent.*

*Actio non, after craving oyer of the bond and condition, as post, 725.]—*Because he says, that after the making of the said writing obligatory, and before the said — day of — A. D. — in the said condition mentioned, to wit, on the — day of — A. D. — at, [*&c. venue*] aforesaid, the said G. H. and J. K. did make their award in writing under their respective hands, of and concerning the premises in the said condition mentioned, and so referred to them as aforesaid, and ready to be delivered to the said parties in difference, and did thereby award, arbitrate, and determine, that, &c. [*here set forth the whole of the award without the recitals, and which award directed the plaintiff to perform an act which constituted a condition precedent*] as by the said award, reference being thereunto had, will more fully appear, which said matters above recited are the whole of the matters by the said award directed to be performed by the said plaintiff and defendant respectively. And the said defendant in fact saith, that he the said defendant, at the day in the said award in that behalf directed, to wit, on the said — day of — A. D. — in the said award mentioned, to wit, at, [*&c., venue*] aforesaid, requested the said plaintiff to, [*&c., to perform the act by the award directed to be done by the plaintiff*] and to perform the said award in all things on his part and behalf to be performed, and the said defendant was then and there ready and willing, and offered to the said plaintiff to perform the said award in all things on his part to be performed and fulfilled, if the said plaintiff would perform the said award in the several matters and things directed to be performed by him the said plaintiff; but the said plaintiff then and there wholly refused to, [*&c., state the plaintiff's non performance of the condition precedent*] and to perform the said award in the several matters and things directed by the said award to be performed on the part and behalf of him the said plaintiff. And this, &c.—[*Conclude with a verification, as ante, 641.*

Bail Bonds.

SEC. V. RAIL BONDS.

10. *Plea that there was no writ in the original Action.*

C. D. }
 ats. } ——— Com. Pleas. In Debt.
 A. B. }

And the said C. D., defendant in this suit, by G. H., his attorney, comes and defends, &c., and says that the said plaintiff ought not to maintain his aforesaid action thereof against him, because he says * that no writ of capias as in the declaration mentioned, whereon the said E. F. could or might be holden to bail, was issued out of the said court in the said action, in the said condition mentioned, before the making of the said supposed writing obligatory; and this the defendant is ready to verify, &c. Wherefore he prays judgment if the said plaintiff ought to maintain his aforesaid action thereof against him, &c.

G. H., Attorney for Defendant.

11. *Plea that the Bond was not assigned by the Sheriff.*

*Commencement as in the preceding form to the asterisk * and then as follows:]* That the said supposed writing obligatory was not at any time before the commencement of this writ, assigned by the said sheriff to the plaintiff by indorsement in writing made thereon, under the hand and seal of the said sheriff, in the presence of two witnesses, according to the form of the statute in such case made and provided; and of this the defendant puts himself upon the country, &c.; and the plaintiff doth the like, &c.

G. H., Attorney for Defendant.

12. *Plea that the Bail was put in and Perfected.*

Commencement as in above form 10, to the asterisk, and then as follows:] That the said E. F. did, after the making of the said writing obligatory, to wit, within ——— days after the return of the said writ, and on the *first* day of the return term of said writ, to wit, on, [*&c.*] cause special bail to be put in for him to the said action in the said condition mentioned in the said court, according to the exigency of the said writ, and the form and effect of the said condition, and thereupon heretofore, to wit, on, [*&c.*] according to the exigency of the said writ and the course and practice of the said court, K. L. and M. N. came into the said court in their proper persons, and then became pledges and bail [*&c.*, set out the recognizance stating they became bail "in the said action against the said E. F., the same being an action on promises," as the case may be,] as by the record of the said recognizance remaining in the said court fully

Bonds.

appears ; and this the defendants are ready to verify by the said record ; wherefore they pray judgment, &c.

13. *Replication thereto — nul tiel Record.*

Commencement as in form 5, page 642, and then as follows :] Because he says that there is not any record of the said supposed recognizance in the said plea mentioned, remaining in the Court of Common Pleas of — county aforesaid, before the aforesaid judges thereof, in manner and form as the said defendant hath above in said plea alleged ; and this the plaintiff is ready to verify, when, &c. Wherefore he prays judgment for the said debt and his damages for the detention thereof, &c.

J. H., Attorney for the Plaintiff.

SEC. VI. BONDS.

14. *To Debt or Money, Bond, &c., plea of payment according to the condition, (ad diem.)*

C. D. }
ats. } ——— Com. Pleas. In Debt.
A. B. }

And the said C. D., defendant in this suit, by S. & S., his attorneys, comes and defends the wrong and injury, when, &c., and craves oyer of the said writing^a obligatory, in the said declaration mentioned, and it is read to him,^b &c. He also craves oyer of the condition of the said writing obligatory, and it is read to him in these words : [*here set forth the recitals, if any, and the condition, verbatim,*^c] which being read and heard, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says^a that he, the said defendant, on the said — day of —, in the year one thousand eight hundred and — aforesaid, [*the day of payment mentioned in the condition,*] in the said condition of the said writing obligatory mentioned, paid to the said plaintiff the said sum of — dollars, in the said condition mentioned, together will all interest then due thereon, according to the form and effect of the said condition, to wit, at, [*&c., the venue*] aforesaid. And this he is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

S. S., Defendant's Attorneys.

(a) When the defendant means to dispute the validity of the deed, the plea should refer to it as — “said supposed writing obligatory.” 3 Chitt. Pl. 953., note (c).

(b) The bond itself need not be set forth. Id. ibid, note (i).

(c) The whole condition must be set forth, on oyer. Id. ibid, note (i).

 Bonds.

15. *Plea of Payment (post diem) in such case.*

As in the preceding form to the asterisk, and then as follows: That he, the defendant, did, after the said — day of —, A. D. —, in the said condition mentioned, and before the commencement of this suit, to wit, on, [*&c., any day before writ issued.*] pay to the plaintiff the said sum of — dollars, in the said condition mentioned, together with all interest then due thereon; and this the defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

S. & S., Defendant's Attorneys.

16. *Replication to a Plea of payment post or ad diem.*

A. B. }
 v. } — Common Pleas. In Debt.
 C. D. }

And the said plaintiff, as to the said plea of the said defendant, by him [*secondly*] above pleaded, says that the said plaintiff, by reason of any thing in that plea alledged, ought not to be barred of his said action thereof against the defendant, * because he says that the defendant did not pay to him, the plaintiff, the said sum of — dollars, and interest for the same, as in the said plea alleged; and this the plaintiff prays may be inquired of by the country; and the defendant doth the like, &c.

E. E., Plaintiff's Attorney.

17. *Plea that a new Injunction Bond had been substituted in the place of the one Sued upon.**

And now comes the said Lucius, one of the attorneys of this court, in his own proper person, and the said Joseph, by the said Lucius, his attorney, and defend the wrong and injury, when, &c., and crave oyer of the said writing obligatory in said declaration mentioned, and it is read to them, &c., and also crave oyer of the condition of said writing obligatory thereunder written, and it is read to them, &c., as in said declaration set forth, and thereupon for plea in this behalf, the said Lucius and Joseph say that the said plaintiffs ought not to have or maintain their aforesaid action against them, because they say that after the making of the said writing obligatory, and the condition thereof aforesaid, and while the said bill of complaint mentioned in the condition thereof, was pending in said court, and while said Court of Common Pleas on the Chancery side thereof, had jurisdiction of all and singular the matters

(*) 6 Ohio Rep. 336; Wil. Prac. 244.

Bonds.

therein contained, and all the parties being before said court, to wit, at the October term of said Court of Common Pleas, in the year 1831, said court sitting as a Court of Chancery, on hearing of the parties in interest, by an interlocutory decree then and there made in said cause as an equitable condition upon the parties in interest, did order and adjudge that said writ of injunction in the condition of the said writing obligatory mentioned and set forth in said declaration, be renewed and continued, on the said Lucius giving bond to the acceptance of the clerk of said court, in the sum of fifteen hundred dollars, (as such equitable condition in the premises imposed by said court upon the said Lucius, complainant in said court,) as an indemnity and security to the said Zenas and others, respondents in said cause, in the condition of said writing obligatory set forth, in the event of a dismissal of said bill of complaint and dissolution of said injunction in said court, in place of, and as a substitute for, the said writing obligatory in said declaration mentioned.

And the said Lucius and Joseph in fact say, that in compliance with said interlocutory decree and such equitable condition aforesaid, the said Lucius afterwards, to wit, on the fifteenth day of February, 1832, did give a bond with one Joseph De Wolf, jun., and William Coolman, jun., as sureties, to the acceptance of the clerk of said court, in the sum of fifteen hundred dollars, as an indemnity and security to the said Zenas, and others, respondents in said cause, in the condition of said writing obligatory mentioned, in the event of a dismissal of said bill of complaint, and dissolution of said injunction in said court, according to the usages and practice of said court, sitting as a Court of Chancery, and in obedience to the order and judgment of said court aforesaid in the premises, which said last mentioned bond so given, delivered and accepted in place of, and as a substitute for, the said writing obligatory in said declaration mentioned, indemnifying and securing said Zenas and others aforesaid, still remains in and among the files of said court, sitting as a Court of Chancery, and this the said Lucius and Joseph are ready to verify; wherefore they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

And the said Lucius and Joseph, for a further plea in this behalf, further defend the wrong and injury, when, &c., and by leave of the court for that purpose first had and obtained, further say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, the said defendants, because they say that after the execution of the bond and writing obligatory, and the condition thereunder written in said declaration mentioned, and after such proceedings were had in the said cause, and the same carried by appeal to the Supreme Court, and after the said Lucius did not prosecute his said suit with effect, as is in said declaration mentioned, according to the condition of said writing obligatory, to wit, at a term of the said Supreme Court, begun and holden at Ravenna, in and for said county, as is in said declaration set forth, they, the said Lucius, complainant in said suit, and the said Lucius, Darius, Cyrus, Isaac and Jonathan, respondents in said suit, being

Bonds.

present in said court, upon a final hearing in said suit, submitted all and singular the premises, matters and things touching or growing out of said bill of complaint and suit, and the proceedings arising thereon, to the final decision of said court, which said court then and there determined and decreed that said injunction be dissolved, and the said bill dismissed, as is in said declaration set forth, and further determined and decreed on said final hearing, by reason of the dissolving said injunction and dismissing said bill, and by reason that the said Lucius had failed to prosecute his said suit to effect, as in the condition of said writing obligatory, and provided that the said Lucius should pay the costs of said suit to be taxed, which were then and there adjudged to the said Zenas and others, respondents in said suit, with their assent, and made no other or further order or decree on the final hearing aforesaid.

And the said Lucius and Joseph, defendants in this suit, in fact say, that afterwards, to wit, on the — day of October, in the year 1832, and before the commencement of this suit, he, the said Lucius, did pay, in compliance with the conditions of said writing obligatory, and the determination and decree of said court as aforesaid, the full amount of all moneys, damages, losses, injuries and costs charged and decreed against him by said court, on the final hearing of said suit as aforesaid, which were then and there accepted by the said Zenas and others, respondents, as by the condition of the said writing obligatory and determination and decree of said court, he, the said Lucius, was bound to do, and this the said Lucius and Joseph are ready to verify; wherefore they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, and if they, the said defendants, ought to be charged with the said debt by virtue of said supposed writing obligatory, &c.

18. *Non Damnicatus.**

*Commencement as in preceding form 14, page 725, to the *, and then as follows:—*that the plaintiff hath not at any time since the making of the said writing obligatory and condition thereof, hitherto been in any manner damaged by means of any matter or thing in the said condition mentioned, and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his said action against him, &c.

J. S., Attorney for Defendant.

(a) This plea is sufficient when the condition of the bond is merely to indemnify. But when the condition is for the performance of any particular act, the performance must be specially pleaded. 1Saund. 116.n. 1; 1Bos. & Pull. 638, 640.

Bonds.

19. *To Debt on Bond (not assigning a breach) conditioned to perform the covenants in another indenture. — Plea of performance thereof.*

C. D. }
 ats. } ——— Com. Pleas. In Debt.
 A. B. }

And the said C. D. comes and defends, [&c.] and craves oyer of the said supposed writing obligatory in the declaration mentioned, and it is read to him in these words: [*Here copy the obligatory part of the bond.*] And the said C. D. also craves oyer of the condition of the said writing obligatory, and it is read to him in these words: [*Here set out the recitals and conditions verbatim, and then if the condition be merely to perform a particular covenant in the indenture it would seem to be sufficient to proceed as follows:*] Which being read and heard the said C. D. saith that the said A. B. ought not to have his aforesaid action thereof against him because he says * that in and by the said indenture in the said condition mentioned, (and which being in the plaintiff's possession, the defendant cannot produce the same to the said court here,) and which is sealed with the seal of the said C. D., he did covenant, [&c., *setting out the covenant in question,*] and the said C. D. avers that he did, [&c., *showing performance of the covenant and condition,*] according to the said covenant and the said condition, to wit, at said county of —, and this the said C. D. is ready to verify; wherefore he prays judgment if the said A. B. ought to have his said action against him.

J. S., Attorney for Defendant.

20. *Plea of general performance in like case.*

*Proceed as in the preceding form to the * and then as follows:*—That there was not nor is there any negative or disjunctive covenant or agreement contained in said indenture in the said condition of the said writing obligatory mentioned on the part of the said C. D. to be omitted, done, observed, performed, fulfilled or kept, and that he the said C. D. hath truly performed and kept the said indenture and all things contained therein, according to the true intent and meaning thereof, and of the said condition, to wit, at said — county; and this the said C. D. is ready to verify; wherefore he prays judgment if the said A. D. ought to have his said action against him.

J. S., Attorney for Defendant.

(a) The whole indenture should in strictness be set out, and certainly performance of all the defendant's covenants should be averred when the condition is general for performance of defendant's covenants. See 1 Samd. 32, 8, 9; 2 Samd. 409; 2 Chitty's Pl. 986, 987; 4 East. 344, 345. See ante, note (v) vol. 1, page 354 to 357.

Bonds.

21. *Plea of performance of a bond conditioned to indemnify or to do some collateral act other than the payment of money,* no breach of the condition being assigned in the declaration.*

*Proceed as in the form next preceding the last to the * and then as follows:] that he did [&c., aver performance of the whole of the condition in the words thereof, showing the day of performing particular acts to be done, &c.] according to the same condition, to wit, at said county of —; and this the defendant is ready to verify; wherefore he prays judgment if the said A. B. ought to have his said action against him.*

J. S., Attorney for Defendant.

22. *Plea in excuse of performance that Defendant was ready and willing to have produced a good title upon Plaintiff's paying the purchase money but that the Plaintiff discharged him.*

Actio non, as ante, 640.]—Because he says, that the said defendant before the said — day of, [&c.] in the said agreement mentioned, to wit, on, [&c.] at, [&c., venue] was ready and willing, and offered to the said plaintiff to produce a clear and perfect title in the law, of and in the said messuages and tenements, and to execute a proper conveyance thereof to the said plaintiff, to hold to him the said plaintiff, his heirs and assigns forever, upon his the said plaintiff's paying to the said defendant the full sum of — dollars, as and for the purchase money thereof, whereof the said plaintiff then and there had notice; but that the said plaintiff then and there required the said defendant not ever^b to produce the same, or to execute the said conveyance to the said plaintiff, and the said plaintiff then and there forbid the said defendant then or ever so to do; and the said plaintiff then and there declared to the said defendant that he would not, nor did he ever pay to the said defendant the sum of — dollars, [&c.] as for the said purchase money, and the said plaintiff then and there wholly declined and disavowed, and discharged the said defendant from the carrying of the said agreement in the said declaration mentioned into execution, for which reason and no other the said defendant did not, upon or before the said — day of, [&c.] produce, nor hath he at any time since hitherto produced a clear and perfect, or other title in the law, of and in the said freehold messuages and tenements, and premises, or any part thereof, to hold him the said plaintiff, his heirs and assigns for ever, according to the tenor and effect, true intent and meaning, of the said agreement in that behalf, and this, [&c., conclude with a verification as in preceding form.

(a) See as to assignment of breaches in the declaration, &c., vol. 1, 354, note (v.) er, but it seems an awkward mode of stating the facts: *per Chitty*.

(b) This form was drawn by an eminent plead-

Bonds.

23. *Plea of non-performance by Plaintiff of a condition precedent.*

Actio non, after craving oyer of the bond and condition, and setting out the latter, as ante 725, or if the bond be conditioned for the performance of covenants in an indenture, and the plaintiff has neglected to perform a condition precedent therein, then set forth the indenture, and the reference thereto, and then state the plaintiff's non-performance, as follows:] And the said defendant as to the said covenant in the said indenture contained, that he the said defendant would, during the continuance of the said demise, repair, and keep in repair, the said demised premises, with the appurtenances, being allowed timber in the rough, sufficient and proper for such repair, from time to time to be provided and set out by the said plaintiff, his heirs and assigns, [*this is to be according to the words of the particular covenant qualified by the condition precedent,*] the said defendant saith, that at the time of the making of the said demise, the said premises were ruinous, prostrate, and in great decay, for want of needful and necessary reparation and amendment thereof, and that after the making the said indenture, to wit, on the — day of —, A. D. — at, [*&c., venue*] aforesaid, there was need and occasion for a large quantity, to wit, — loads of timber in the rough, to repair the said demised premises, with the appurtenances; and the said defendant then and there requested the said plaintiff to allow to him the said defendant timber in the rough, sufficient and proper for the repair of the said demised premises, with the appurtenances, and to provide and set out the same accordingly, yet the said plaintiff did not, nor would, when he was so requested, as aforesaid, or at any time before or since, allow to him the said defendant, timber in the rough, sufficient or proper for the repair of the said demised premises, with the appurtenances, or provide or set out the same, but then and there wholly neglected and refused, and hath thence hitherto wholly neglected and refused so to do, to wit, at, [*&c., venue*] aforesaid; and the said defendant further saith, that he the said defendant hath always,* since the making the writing obligatory, well and truly observed, performed, fulfilled, and kept, all and singular other the covenants, articles, clauses, provisos, payments, conditions, and agreements, in the said indenture comprised and mentioned, which on the part and behalf of him the said defendant and his assigns, were or ought to be observed, performed, fulfilled, or kept, according to the true intent and meaning of the said indenture. And this, [*&c.* *Conclude with a verification as ante 641.*

Death of Principal before return of ca. sa.

Actio non, as ante 640.]—Because he says, that after the recovery of the said judgment in the said declaration mentioned, and before the return of any

(a) When a defendant would excuse himself every other part; because if any part be broken for the non performance of part of the condition the penalty is forfeited, 10 Mass. Rep. 543. of a bond, he must also plead performance of

Bonds.

writ of *capias ad satisfaciendum* thereupon against the said E. F. [*the principal*] at the suit of the said plaintiff upon the said judgment, to wit, on, [*&c.*] he the said E. F. died, to wit, at, [*&c., venue*] aforesaid. And this, [*&c.* *Conclude with a verification as ante* 641.

24. *Plea in suit upon bond in error that puis darrien continuance, the debt was levied by fi. fa. on the principal.*

Actio ulterius non, as ante 640]—Because he says, that at the time of executing the writ of *testatum fi. fa.* hereinafter mentioned, there was due and owing from the said J. J. to the said plaintiff, for and on account of the said debt, damages, costs and charges, in the said declaration mentioned, the sum of — dollars and no more, to wit, at, [*&c., venue*] and the said defendant further says, that after the affirmance of the said judgment and the said adjudication of the said Supreme Court, and before the commencement of the suit of the said plaintiff in this behalf, to wit, on, [*&c.*] at, [*&c.*] in — Term last past, the said plaintiff, for the obtaining of the said money then due to him, in respect to the said debt, damages, costs, and charges aforesaid, out of the court of Common Pleas of said — county, the said judgment and adjudication, a certain writ of the State of Ohio, called a *testatum fi. fa.*, directed to the sheriff of —, by which said writ the said State commanded the said sheriff [*here set out writ,*] upon which said writ afterwards, and before the delivery thereof to the said sheriff, was duly indorsed, and which said writ so indorsed as aforesaid, afterwards and before the return thereof, to wit, on, [*&c.*] was delivered to the said G. H. who then and from thenceforth, until and after the return of the said writ, was sheriff of the county of E. to be executed in due form of law. By virtue of which said writ, the said sheriff afterwards, and before the return thereof, and after the last continuance of the plea aforesaid, that is to say, after the — day of — in — Term last past, from which time the plea aforesaid was continued till this day, to wit, from the day in — in this same Term, and before this day, and after the commencement of this suit of the said plaintiff, that is to say, on, [*&c.*] within his bailiwick, to wit, at, [*&c.*] aforesaid, did cause to be levied of the goods and chattels of the said J. F. the sum of — dollars, being all the money then due and owing to the said plaintiff upon and by virtue of the said judgment and adjudication, and all the sheriff's poundage and officers' fees, as he was directed by the said indorsement so made on the said writ as aforesaid. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him, &c.

25. *Replication to plea of performance conditioned for E. F.'s duly accounting as Clerk, that E. F. received moneys which he did not account for.*

Precludi non, as ante, p. 642, form 5.]—Because he saith, that the said E. F. remained and continued in the service and employ of the said plaintiff as

Bonds.

such clerk, as in the said condition of the said writing obligatory mentioned, for a long space of time, to wit, from the day and year aforesaid, until and upon the — day of —, A. D. —; and that during the said time that the said E. F. so remained and continued in the said service and employment of the said plaintiff as such clerk as aforesaid, to wit, on, [&c.] and on divers other days and times, [between that day and the said — day of —, A. D. —, to wit, at, [&c., venue] aforesaid, the said E. F. as such clerk as aforesaid, had and received, for and on the account of the said plaintiff, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of — dollars, yet the said G. H., although often requested so to do, hath not yet accounted for or paid the same or any part thereof to the said plaintiff, but hath therein wholly failed and made default; and the said sum of money so had and received by the said E. F. as aforesaid, is still wholly unpaid and unsatisfied to the said plaintiff, contrary to the form and effect of the said condition of the said writing obligatory, to wit, at, [&c.] aforesaid. And this, [*conclude with a verification as ante, p. 642.*]

26. *The like stating several breaches.*

Same as the above form to the end of the verification, and then state the second breach, as follows:—And for assigning a further breach of the said condition of the said writing obligatory, according to the form of the Statute in that case made and provided, the said plaintiff saith, that after the making of the said writing obligatory, and whilst the said E. F. remained and continued in the said service and employ of the said plaintiff as such clerk as aforesaid, to wit, on, [&c.] at, [&c., venue] aforesaid.—[*State the breach according to the fact, and conclude with a verification, as in the preceding form.*]

27. *Replication to a plea of performance assigning a breach according to the statute,^a none being assigned in the declaration.*

A. B. }
v. } ——— Com. Pleas. In Debt.
C. D. }

And the said plaintiff, as to the said plea of the said defendant by him [secondly] above pleaded, says that the said plaintiff, by reason of any thing in that plea alleged, ought not to be barred of his said action thereof against the defendant, because he says that—[*The allegations must depend on the nature of the bond.*] *If the bond be for fidelity of a clerk, &c., the replication in assigning a breach should show that he was retained [&c.] from — to —, and that, although during that time he, from time to time, received moneys,*

(a) See statute and decisions relating thereto, ante vol. 1, page 854, note (v.)

Boads.

[&c., using the words of the condition,] yet he did not pay and account, [&c.] although requested, [&c.] and — dollars remain unpaid, [&c. See ante, Vol. I, 361, Form 11. If the bond be for the payment of money, a part of which only has accrued due, and the condition be only for the payment of money, and the substance of the plea be performed by payment thereof, the replication may be simply, "that the defendant did not pay, or cause to be paid to the plaintiff, the said sum of — dollars, and interest, or any part thereof, as in the said [second] plea alleged; and this the plaintiff prays may be inquired of by the country, &c. And the defendant doth the like."

J. B., Attorney for Plaintiff.

28. *Suggestion of breaches on the Record under the statute,* when no breaches are assigned in the pleadings.*

After the judgment by default, or on demurrer, or on noli tuel record, or non est factum is entered, as in the Forms hereinafter given, enter on the journal of the court the suggestion of breaches, thus :

A. B. }
v. } In Debt.
C. D. }

And the said plaintiff now comes and says, that the said writing obligatory in said declaration mentioned, was subject to a certain condition thereunder written, whereby, after reciting, [&c., here state the recitals in the past tense,] it was declared that the condition of the said writing obligatory was such, that, [&c., here state the condition in the past tense,] as by the said writing obligatory fully appears; [then state the breaches thus:] nevertheless, for suggesting a breach of the condition of the said writing obligatory, the plaintiff, according to the form of the statute in such case made and provided, suggests and gives the court here to understand and be informed, that the defendant did not nor would, [&c., state the breach, and if there be two or more breaches, proceed as follows:] and the plaintiff, for suggesting a further breach of the said condition of the said writing obligatory, according to said statute, further suggests and gives the court here to understand and be informed, that, [&c., state the further breach. The court or jury assess the damages upon the breaches suggested, as in other cases; and judgment for penalty and order of execution for the amount found equitably due is entered. See the forms, post, Verdicts and Judgments in Debt.

(a) See statute, &c., ante vol. I, p. 354, note (v.)

Coverture.

29. *Another Form in like case, where the Plaintiff has declared for the penalty alone, and there has been oyer craved of the condition, and the condition set forth upon plea of non est factum.*

Before the issue upon the plea of non est factum is tried, assign the breaches thus:

A. B. }
v. } In Debt.
C. D. }

And the said plaintiff now comes, and for assigning breaches of the condition of the said writing obligatory, according to the statute in such case made and provided, says that, [*&c.*, state the breaches, as in a declaration. The issue is then tried and damages on the breaches assessed.

SEC. VII. COVERTURE.*

30. *Plea of Coverture to debt on bond.*

C. D. }
ats. } ——— Com. Pleas. In Debt.
A. B. }

And the said defendant comes and defends the wrong and injury, when, &c., and says that she ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because she says that, at the time of the making said writing, she was and still is the wife of E. F., to wit, at said county of —, and this she is ready to verify; wherefore she prays judgment if she ought to be charged with the said debt, by virtue of the said supposed writing obligatory.

J. S., Attorney for Defendant.

31. *Plea of Coverture to debt on simple contract.*

C. D. }
ats. } ——— Com. Pleas. In Debt.
A. B. }

And the said defendant comes and defends the wrong and injury, &c., and says that the said A. B. ought not to maintain his aforesaid action thereof

(a) May be given in evidence under general issue of nil debit or non est factum: 3 Burr. 1306; 2 Str. 1104.

Devisee — Duress.

against her, because she says that, at the time of the making of the said supposed contracts, she was and still is the wife of one E. F., to wit, at said county of —, and this she is ready to verify; wherefore she prays judgment if the said A. B. ought to maintain his aforesaid action against her, &c.

J. S., Attorney for Defendant.

SEC. VIII. DEVISEE.

32. *Plea of rien per devise.*

Onerari non, as ante, 721.] Because he says that he, the said defendant, hath not, nor at the time of the commencement of this suit, nor at any time before or since, had any lands, tenements, or hereditaments, by devise from the said E. F., deceased. And this, [*conclude with a verification, and onerari non as ante, 721.*]

33. *Replication that the Devisee had Assets.*

Precludi non, as post, form 35.] Because he saith that the said defendant, after the death of the said E. F., his father, and before the commencement of this suit, to wit, on, [*&c.*] at, [*&c. venue,*] aforesaid, had divers lands and tenements by hereditary descent as heir to the said E. F. in fee simple, whereby he might have satisfied the said plaintiff the debt and damages aforesaid. And this, [*&c., conclude with a verification, as ante 642.*]

SEC. IX. DURESS.

34. *Plea of Duress of Imprisonment.*

C. D. }
ads. } — In Debt.
A. B. }

And the said C. D. comes and defends, &c., and says that he ought not to be charged with the said debt by virtue of the said writing obligatory, because he says, that at the time of the making of the said writing, he, the said C. D., was imprisoned by the said A. B. and others, by their covin, to wit, at, [*&c.*] and there detained in prison until by force and duress of that imprisonment he, the said C. D., then and there made, sealed and delivered the said writing to the said A. B.; and this he is ready to verify: wherefore he prays judgment if he ought to be charged by the said writing obligatory, and for his costs, &c.

Duress — Escape.

35. *Replication—Defendant at large, &c.*

And the said A. B. says, that notwithstanding any thing by the said C. D. in pleading alleged, he ought to be charged with the said debt by virtue of the said writing obligatory, because he says, that the said C. D., at the time of the making of the said writing obligatory, was at large, and at his full liberty, and out of all prisons whatsoever, and that he made, sealed and delivered the said writing to the said A. B. of his own free will and accord, and not by force or duress of imprisonment, and this he prays may be inquired of by the country, &c.

36. *Plea of Menace to Kill.*

First plea, general issue, non est factum, as ante, p. 719; secondly, and for a further plea, &c., onerari non, as ante, p. 721,] because he says, that the said plaintiff, just before the making of the said writing in the said declaration mentioned, to wit, on the said — day of —, A. D. —, aforesaid, at, [*&c.*,] aforesaid, menaced and threatened the life of the said defendant, unless the said defendant would make and seal, and as his act and deed deliver the said writing [*or, indenture, or, articles*] in the said declaration mentioned; and the said defendant did thereupon then and there, by reason and in consequence of such menaces and threats, and in fear and apprehension thereof, make and seal, and as his act and deed deliver the said writing; and this, [*&c.*; conclude with a verification, and onerari non, as ante, p. 721.

37. *Replication that Defendant freely executed the Deed.*

Precludi non, as ante, above, form 35,] because he saith, that the said defendant, of his own free will, made and sealed, and as his act and deed delivered to the said plaintiff the said writing obligatory in the said declaration mentioned, and not by reason or in consequence of the said supposed menaces or threats in the said [*second*] plea mentioned, or in fear or apprehension thereof in manner and form as the said defendant hath in his said [*second*] plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, &c.

SEC. X. ESCAPE.

38. *Plea to Debt for an Escape from Execution against the Sheriff—Fresh pursuit and Recaption.*

First plea, nil debit, as ante, p. 717; second plea, actio non, as ante, p. 463, form 6,] because he says, that the said judgment and commitment in

 Escape.

execution in the [first] count of the said declaration, and the judgment and commitment in execution in the second count of the said declaration mentioned, are one and the same judgment and commitment, and not divers or different judgments and commitments, and that the supposed escape in the said first count, and the supposed escape in the said second count mentioned, are one and the same escape, and not divers or different escapes, and that after the said commitment of the said J. S. to the custody of the said defendant, in execution as aforesaid, to wit, on the said, [*&c.*] at, [*&c., venue.*] aforesaid, the said J. S. forcibly, and without the knowledge, consent, or permission of the said defendant, and against his will, escaped from and out of the custody of him, the said defendant, as such sheriff as aforesaid, and fled to places to him, the said defendant, unknown, and that upon the said escape of him, the said J. S., to wit, at, [*&c., venue.*] he, the said defendant, made fresh and close pursuit after the said J. S., in order to retake him, and did continue such pursuit from thence until he, the said defendant, afterwards, and before the commencement of the suit of the said plaintiff against him, the said defendant, in this behalf, to wit, on, [*&c.*] at, [*&c., venue.*] aforesaid, retook the said J. S. upon that pursuit, and again had and detained, and hath from thence hitherto always kept and detained, and doth keep and detain him, the said J. S., in the custody of him, the said defendant, in execution at the suit of the said plaintiff, for the said damages, costs and charges, so by him recovered as aforesaid, by virtue of the said commitment of him, the said J. S., in execution as aforesaid, to wit, at, [*&c.*] aforesaid, which said escape, in this plea mentioned, is the same escape whereof the said plaintiff hath above complained against him; and this, [*&c.* ; conclude with a verification, as ante, p. 640, form 1.

 39. *Replication that suit was brought before the Recaption.*

Precludi non, as ante, p. 642,] because he saith, that the said now defendant did not, before the commencement of this suit against the said now defendant in this behalf, retake the said E. F. upon the said pursuit, or again have or detain him, the said E. F., in the custody of the said now defendant in execution, at the suit of the said plaintiff for the damages, costs and charges, so by him recovered as aforesaid, by virtue of the said commitment of the said E. F. in execution as aforesaid, in manner and form as the said defendant hath above in his said plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, &c.

 40. *Plea that the Prisoner forcibly Escaped, and has since Returned.*

Third, or further plea, actionem non, as ante, p. 643, form 6,] because he says, that the said judgment and commitment in execution, in the first count of

Escape.

the said declaration mentioned, and the judgment and execution in the said second count of the said declaration mentioned, are one and the same judgment and execution, and not divers or different judgments and commitments, and that the said supposed escape in the said first count, and the said supposed escape in the said second count of the said declaration mentioned, are one and the same escape, and not divers or different escapes; and that after the said commitment of the said J. S. to the custody of him, the said defendant, in execution as aforesaid, to wit, on, [*&c.*,] aforesaid, to wit, at, [*&c.*, *venue*,] aforesaid, he, the said J. S., wrongfully, privily, and without the knowledge, permission, or consent of the said defendant, escaped from and out of the custody of the said defendant, as such sheriff as aforesaid, to places to him, the said defendant, unknown; but the said defendant in fact further saith, that the said J. S. afterwards, and before the exhibiting of the bill of the said plaintiff against him, the said defendant, in this behalf, to wit, on, [*&c.*,] last aforesaid, at, [*&c.*, *venue*,] aforesaid, voluntarily, and of his own accord, returned back again into the custody of him, the said defendant, and that he, the said defendant, did thereupon then and there keep and detain, and always from thence hath hitherto kept and detained, and still doth keep and detain him, the said J. S., in the custody of him, the said defendant, in execution, at the suit of the said plaintiff, under and by virtue of the aforesaid commitment of him, the said J. S., in execution, as aforesaid, to wit, at, [*&c.*, *venue*,] aforesaid, which said escape, in this plea mentioned, is the same escape whereof the said plaintiff hath above complained against the said defendant; and this, [*&c.*; conclude with a verification, as ante, p. 641, form 1.

41. *Replication that Escape was Voluntary.*

Precludi non, as ante, p. 642,] because he says, that after the commitment of the said E. F. to the custody of the said defendant, in execution, as aforesaid, that is to say, on the — day of —, in the year —, the said defendant then and still being sheriff of the county of — aforesaid, at, [*&c.*, *venue*,] aforesaid, he, the said defendant, of his own wrong, permitted and suffered the said E. F. to go at large whither he would, and to escape out of the custody of the said defendant, in manner and form as the said plaintiff hath above complained against him; without this, that the said E. F. forcibly, and without the knowledge, consent or permission of the said defendant, and against his will, escaped from and out of the custody of him, the said defendant, as such sheriff as aforesaid, in manner and form as the said defendant hath in his said plea by him secondly above pleaded in bar alleged; and this, [*&c.*; conclude with a verification, as ante, p. 642, form 5.

 Escape.

 42. *Plea that the Prisoner was discharged with the Plaintiff's consent.*

Actio non,] because he says, that after the said surrender and commitment of the said E. F. in the said several counts of the declaration of the plaintiff mentioned, and before the said E. F. was by the said defendant permitted and suffered to go out of his custody at large and abroad wheresoever he would and pleased, without restraint, as in said several counts of the said declaration is alleged, to wit, on, [*&c.*] at, [*&c.*, *venue,*] aforesaid, the said plaintiff did consent that the said E. F. should be discharged out of the custody of the said defendant so being sheriff of —, as in that behalf is mentioned, as to the said several actions in the said several counts of the said declaration mentioned, and whereupon the said E. F. had been committed to the custody of him, the said defendant, and did give license to the said defendant to discharge the said E. F. out of the custody of the said defendant as to the said several actions and suits, and permit and suffer him to go out of the custody of him, the said defendant, at large and abroad wheresoever he would and pleased, and without restraint; and thereupon the said defendant did discharge the said E. F. out of his custody, as to the said several actions and suits, and permit and suffer him to go out of the custody of the said defendant, at large and abroad wheresoever he would and pleased, and without restraint: without this that the said defendant did voluntarily, wrongfully, and freely, and without the leave or license of the said plaintiff, permit or suffer the said E. F. to go and escape out of the said custody of the said defendant, so being sheriff of the said county of —, as aforesaid, in manner and form as the said plaintiff hath above thereof complained against him; and this, [*&c.*; *conclude with a verification, as ante, p. 641, form 4.*

 43. *Replication to Plea of Forcible Escape, &c. — That the Plaintiff sues for another and second Escape.*

Replication to first plea, similiter; to second plea, the plaintiff admitting that the escape was without the privity of the defendant, and that the return to prison was voluntary, alleges,] that the said E. F. had not from thenceforth been kept and detained in the custody of the said defendant, but that after he, the said E. F., had so returned into custody, and after the said defendant had notice of the former escape, and before the commencement of this suit in this behalf, the said defendant permitted and suffered the said E. F. to escape and go at large, in manner and form as the said plaintiff hath above complained against him, the said defendant, which said last mentioned escape is another and different escape than the escape mentioned in the plea of the said defendant so by him lastly above pleaded in bar as aforesaid, and was and is the very same identical escape for which the said plaintiff brought this action; and this, [*&c.*; *conclude with a verification, as ante, p. 642.*

SEC. XI. ESCROW.

44. *Plea that the Bond was delivered as an Escrow.*

First plea, non est factum, as ante, p. 719; second plea, by leave, &c., and onerari non, as ante, p. 721,] because he says, that the said writing, in the said declaration mentioned, was made by the said defendant on, [*&c.*,] aforesaid, to secure the re-payment of a certain sum of money, then lent by the said plaintiff to one E. F., and delivered by the said defendant to one G. H., as an escrow to be kept by him on this special condition, that is to say, that [if the said E. F. should, within the space of — months then next following, secure the re-payment of the said sum of money to the said plaintiff, by mortgage upon certain freehold premises of the said E. F., situate at, *&c.*,] that then and in that case the said writing obligatory should be immediately discharged, annulled, and held for nothing, and returned and re-delivered to the said defendant; but that [in default of the said E. F. so securing the re-payment of the said sum of money to the said plaintiff by such mortgage as aforesaid, within the aforesaid time,] then the said writing obligatory of the said defendant should stand and be against him in full force; and the said defendant further says, that within the space of — months from the time of the making and delivering of the said writing as an escrow to the said G. H. as aforesaid, for the purpose aforesaid, to wit, on the — day of —, A. D. —, at, [*&c.*, *venue*,] aforesaid, the said E. F. did secure the re-payment of the said sum of money to the said plaintiff, by a mortgage upon the said freehold premises of him, the said E. F., which said mortgage the said plaintiff then and there accepted and received as a security for the re-payment of the said sum of money so by him lent to the said E. F. as aforesaid; whereby the said writing of the said defendant so delivered to the said G. H., became and was wholly discharged, annulled, and vacated; and so the said defendant saith, that the said writing is not his deed; and of this he puts himself upon the country, *&c.*

SEC. XII. EXECUTORS.

See *ante p. 679, 722*. In general the body of the pleas in assumpsit, *ante 693, 680*, will be equally applicable in debt.

In an action of debt on simple contracts against an executor, in which the declaration avers that the deceased was indebted, the plea denying the indebtedness would be, that "the said E. F., [the testator,] never was indebted as in the declaration alleged," or in the form, *ante p. 722*.

In actions by executors, the body of the plea of nil debit is in the usual form, *ante 717*.

Fraud.

SEC. XIII. FRAUD.

45. *Plea that the Specialty was obtained by Fraud.**

C. D. }
 ats. } ——— Com. Pleas. In Debt.
 A. B. }

Non est factum as ante 719, and then proceed thus:] And for a further plea the defendant says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, [*or, single bill, or, indenture,*] because he says that the said supposed, [*single bill,*] was obtained from him by the plaintiff, and others in collusion with him, by fraud, covin and misrepresentation,* and this the defendant is ready to verify; wherefore he prays judgment if he ought to be charged with said debt by virtue of the said, [*single bill,*] &c.

J. S., Attorney for Defendant.

*Add a plea setting forth the fraud; the form of which is precisely like the preceding, except that at the * is added the following:]* that is to say, by the said plaintiff, and others in collusion with him, falsely and fraudulently representing to the defendant that [*&c., here state the fraudulent misrepresentations and that the specialty was executed in confidence of such representations.*

46. *The like in Debt on simple Contract.*

C. D. }
 ats. } ——— Com. Pleas. In Debt.
 A. B. }

And the said defendant comes and defends, &c., and says that the plaintiff ought not to have his aforesaid action thereof against him, because he says that the plaintiff caused and induced him, the defendant, to make and enter into the said agreement and contract in the declaration [*or, — count*] mentioned, and to incur the said supposed debt through and by means of the fraud, covin and misrepresentation of the plaintiff and others in collusion with him; and this the defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have his said action against him, &c.

J. S., Attorney for Defendant.

47. *Replication to Plea that Specialty was obtained by Fraud.*

A. B. }
 v } ——— Com. Pleas. In Debt.
 C. D. }

And the said plaintiff, as to the said plea of the said defendant by him [*secondly*] above pleaded, says that the said plaintiff, by reason of any thing in

(a) The general form, without stating what the fraudulent representations were, seems sufficient. 1 Chitt. Prec. 453.

Heirs — Husband and Wife.

that plea alleged, ought not to be barred of his said action thereof against the defendant, because he says that the said, [single bill, *or*, writing obligatory, *or*, indenture,] was not obtained from the defendant by the plaintiff and others in collusion with him, by fraud, covin and misrepresentation, as in the said plea alleged; and this the plaintiff prays may be inquired of by the country. And the plaintiff doth the like, &c.

E. E., Plaintiff's Attorney.

48. *Frauds — Statute of.*

The form of the plea in assumpsit may be used, ante 693, substituting for the word "promise" the word "contract," and concluding in debt, &c. See form of commencement and conclusion of pleas, &c. in debt, ante p. 641, 642.

SEC. XIV. HEIRS.

49. *Plea Rien per descent.*

Onerari non, as ante, 721.—Because he saith, that he the said defendant hath not, nor at the time of the commencement of this suit of the said plaintiff, in this behalf, nor at any time before or since, had any lands, tenements or hereditaments, by descent from his said father, [*or brother, &c., according to the fact,*] in fee simple, and this he is ready to verify, wherefore he prays judgment, if he, as son, [*or brother, &c.*] and heir of the said G. H. deceased, ought to be charged with the said debt, by virtue of the said writing obligatory.

50. *Replication that the heir had assets.*

Precludi non, as ante, 736.—Because he saith, that the said defendant hath, and at the time of the commencement of this suit, had sufficient lands, tenements, and hereditaments by descent from his said father, [*or brother, &c., according to the fact,*] in fee simple, wherewith the said defendant could and might and ought to have satisfied the said debt of the said plaintiff above demanded. And this the said plaintiff prays may be inquired of by the country, &c.

SEC. XV. HUSBAND AND WIFE.

The form of the plea in Assumpsit, ante 687, may be used, substituting the word "contract," or "writing obligatory" or "single bill," (as the case may

Infancy — Judgment.

be,) for the word "promise." For the form of the commencement and conclusion, see form 1, ante p. 641.

In debt against husband and wife, to recover a simple contract debt incurred by the wife before marriage, the plea denying the debt, ante 717, would be, "that the said E. [*the wife*] never was indebted," &c.

SEC. XVI. INFANCY.
51. *Plea of Infancy.*

C. D. }
 ats. } ——— Com. Pleas. In Debt.
 A. B. }

And the said defendant comes and defends the wrong and injury, when, &c., and says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says that, at the time of the making of said writing, he was an infant within the age of twenty-one, [*if a female pleads this plea, say eighteen*] years, to wit, of the age of — years, to wit, at said county of —, and this he is ready to verify; wherefore he prays judgment if he ought to be charged with the said debt, by virtue of the said supposed writing obligatory.

J. S., Attorney for Defendant.

For further forms of the body of the plea, see ante p. 695.

SEC. XVII. JUDGMENT.
52. *Plea of nul tiel record.*

C. D. }
 ads. } In Debt.
 A. B. }

And the said C. D. comes and defends, &c., and says that there is not any record of the said supposed recovery in the said declaration mentioned, remaining in the said court of —, in manner and form as the said A. B. hath in his declaration alleged, and this he is ready to verify; wherefore he prays judgment if the said A. B. ought to have or maintain his said action against him, &c.

Judgment.

53. *Replication, that there is a record of a judgment where it was recovered in another court.*

A. B. }
v. } In Debt.
C. D. }

And the said A. B., as to the said plea of the said C. D. [secondly] above pleaded, says that, by reason of any thing by the said C. D. in that plea alleged, he ought not to be barred from maintaining his aforesaid action thereof against the said C. D., because he says * that there is such a record of the said judgment remaining in the said Court of Common Pleas of — county, in the State of Ohio, as he hath above alleged; and this the said A. B. is ready to verify by the said record, when, where, &c., and prays that an authenticated copy of said record may be seen, &c.

S. H., Attorney for Plaintiff.

This concludes the pleadings.

54. *The like, when the judgment was recovered in the same court.*

Commencement as in the preceding form to the, and then as follows:]* that there is such a record of the said recovery remaining in the said court here as he hath above alleged, and this he, the said A. B., is ready to verify by the said record, as the court shall direct; and he prays said record may be seen, &c.

S. H., Attorney for Plaintiff.

This concludes the pleadings.

55. *To debt on judgment—Plea that the same was satisfied by the Plaintiff taking the Defendant in execution, on a ca. sa. issued thereon.*

And for a further plea in this behalf, the defendant says that the plaintiff ought not to maintain his action thereof against him, because he says that, after the recovery of the said judgment, and before the commencement of this suit, to wit, on, [&c.] at, [&c.] the plaintiff, for obtaining satisfaction of and upon the said judgment, sued and prosecuted out of the Court of Common Pleas of said county of —, a certain writ, called a writ of capias ad satisfaciendum, against the said defendant, directed to the sheriff of —, and dated at —, on the day and year last aforesaid, by which said writ the State of Ohio commanded the said sheriff that he should take the defendant if he should be found in his bailiwick, and him safely keep, so that the said sheriff should have his body before the Court of Common Pleas of —, [&c.] on, [&c., according to

 Leases.

the writ,] to satisfy the plaintiff the damages, and costs, and charges so recovered; by virtue of which said writ the said sheriff afterwards, and before the return thereof, and before the commencement of this suit, to wit, on, [*&c.*] and within his bailiwick, as such sheriff, took and arrested the defendant by his body, and kept and detained him in custody and in execution under and by virtue of the said writ, and for the cause therein specified, for a long time, to wit, twenty days; and this the defendant is ready to verify, [*&c.*]

SEC. XVIII. LEASES.

56. *Plea no rent in arrear.*

Actio non, as preceding form.—Because he says, that no part of the said rent in the said declaration mentioned is in arrear or unpaid, in manner and form as the said plaintiff hath above in his declaration in that behalf alleged, and of this he the said defendant puts himself upon the country, &c.

57. *Plea eviction.*

First plea, nil debit, as ante, 717; second plea, actio non, as ante, 643.]--Because he says, that the said plaintiff, after the making of the said indenture, and before any part of the said rent in the said declaration mentioned became due and payable to the said plaintiff, to wit, on, [*&c.*] with force and arms, &c., entered into and upon the said demised premises, and then and there ejected, expelled, put out, and amoved the said defendant from the possession thereof, and kept and continued him the said defendant so ejected, expelled, put out, and amoved from thence hitherto, to wit, at, [*&c., venue*] aforesaid. And this, [*&c., conclude with a verification, as ante, 641.*]

58. *Replication denying the eviction.*

Precludi non, as ante, 642, form 5.]—Because he saith, that the said plaintiff did not, before the said rent became due, eject, expel, put out, or amove the said defendant from the possession of the said demised premises, or any part thereof, in manner and form as the said defendant hath above in his said plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country; and the defendant doth the like.

Recognizance — Tender.

SEC. XIX. RECOGNIZANCE.

59. *Plea that Recognizance declared upon was taken without authority.**

And for a further plea in this behalf by leave of the court here first had and obtained, the said defendant saith that the said plaintiff her action aforesaid ought not to have or maintain, because he says that on the seventeenth day of January, 1844, the time when said bond or recognizance was taken by the said Robert Moor, and before and after that time, the said Court of Common Pleas, before whom said indictment set forth in the declaration set forth, was found and returned, was in session, it being then the January Term of said Court, in the year eighteen hundred and forty-four, for the transaction of criminal business, and which Court had then and there jurisdiction of offences committed against the State of Ohio, and full and complete power and authority to admit persons charged with the commission of crimes to bail; wherefore he says the said Robert Moore, as one of the judges of the said Court of Common Pleas, had no authority to take the said supposed recognizance, or bond, or obligation, for the purpose aforesaid, and this he is ready to verify; wherefore he prays judgment if the said plaintiff her action aforesaid ought to have or maintain, &c.

SEC. XX. TENDER. See also Assumpsit, ante, 708.

60. *Plea of Tender to Debt on simple Contract.*

C. D. }
ats. }
A. B. }

And the said defendant by E. F. his attorney, comes and defends the wrong and injury, when, &c., and as to the said several sums of money in the said declaration mentioned, and thereby demanded, except as to the sum of [*the sum tendered*] — dollars, parcel thereof, says that he does not owe the same or any part thereof to the said plaintiff in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.; and the plaintiff doth the like, &c. And as to the said sum of — dollars, parcel of the said several sums of money in the said declaration mentioned, the said defendant says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him to recover any damages by reason of the non-payment of the said sum of — dollars, parcel, &c., because he says, that the said defendant at the time when the said sum of — dollars, parcel, &c., became due and payable from the said defendant to the said plaintiff, was, and from thence hitherto hath been, and still is, ready to pay to the said plaintiff the said sum of — dollars, parcel, &c., to wit,

(a) 15 Ohio Rep. 579; Wil. Pr. 247.

Tender.

at, [*&c., venue*] aforesaid, and that after the time when the said sum of — dollars, parcel, *&c.*, became due and payable, and before the commencement of this suit, to wit, on, [*&c., day of tender or about it,*] at, [*&c., venue*] aforesaid, he the said defendant was ready and willing, and then and there tendered and offered to pay to the said plaintiff the said sum of — dollars, parcel, *&c.*, to receive which of the said defendant the said plaintiff then and there wholly refused, and the said defendant now brings the said sum of — dollars, so tendered, into court here, ready to be paid to the said plaintiff if he will accept the same, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, or recover any damages by reason of the non-payment of the said sum of — dollars, parcel, *&c.*

61. *Replication to, denying the Tender, &c.*

And the said plaintiff, as to the said plea of the said defendant by him above pleaded, as to the said sum of — dollars, residue of the said sum of — dollars above demanded, saith that he the said plaintiff ought not, by reason of any thing by the said defendant in that plea alleged, to be barred from having and maintaining his aforesaid action against the said defendant to recover damages by reason of the non-payment of the said sum of — dollars, because he saith, that, [*&c.—Here state the subject matter of the replication, as in the forms in assumpsit, ante, 709 to 712, using the words, "after the said several causes of action in the said declaration mentioned, and each and every of them, accrued to the said plaintiff as to the said sum of — dollars," instead of the words, "after the making of the said promises and undertakings in the said declaration mentioned," and then conclude as follows:*—And this he the said plaintiff is ready to verify, wherefore he prays judgment, and his damages, by reason of the non-payment of the said sum of — dollars, to be adjudged to him, [*&c., but if the replication merely deny the tender, then conclude to the country.*

CHAPTER VII.

PLEAS, REPLICATIONS, &c. IN COVENANT.

SECTION I. GENERAL DIRECTIONS.

1. Plea of non est factum.
2. Plea of non infregit conventionem.
3. Plea of accord and satisfaction.
4. Plea of license.
5. Pleas on policies of insurance.

II. LEASES.

6. Plea that the defendant did repair.
7. Plea that the premises are not out of repair.
8. Plea of tender of rent.
9. Replication in covenant.

SEC. I. GENERAL DIRECTIONS.

The commencement and conclusion of pleas and replications in covenant have been already given, ante p. 640, 642.

The body of the pleas heretofore given in assumpsit and debt, with slight variations, are many of them applicable in covenant.

1. *Plea of non est factum.**

C. D. }
ats. } ——— Coin. Pleas. In Covenant.
A. B. }

And the said C. D. comes and defends, &c., and says that the said supposed *indenture* in the declaration mentioned is not his deed. And of this he puts himself upon the country, &c., and the plaintiff doth the like.

G. H., Attorney for Defendant.

When the execution of the instrument is denied, annex affidavit to the plea, the form of which is given ante p. 720. Add also notice of special matter in bar, or set off. See form, ante p. 717.

(a) Non est factum is such a general issue that notice of matter in bar or set-off may be put in under it. 1 Ohio Rep. 330; 6 Ohio Rep. 35.

The plea of non est factum in covenant admits a breach of the covenant and every material allegation in the declaration except the exe-

cution of the covenant; and even that need not be proved, unless an affidavit is annexed to the plea. 2 Hill (N. Y.) 644; 3 Id. 187; Swan's Stat. 325; 1 Ohio Rep. 330; 5 Id. 169, 340; 6 Id. 35.

Non infregit Conv. — Accord and Satisfaction — License.

2. *Plea of non infregit Conventionem.*

C. D. }
 ads. } ——— In Covenant.
 A. B. }

And the said C. D. comes and defends, &c., and says that he hath not broken the said covenants in the said declaration mentioned, or any or either of them, in manner and form as the said A. B. hath complained against him; and of this he puts himself upon the country, and the said A. B. doth the like.*

3. *Plea of Accord and Satisfaction.*

C. D. }
 ads. } ——— Com. Pleas.
 A. B. }

And the said C. D., defendant in this suit, by J. W. G., his attorney, comes and defends the wrong and injury, when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, * because he says that he, the said defendant, before the commencement of this suit, to wit, on, [&c.,] at, [&c., the venue,] aforesaid, paid to the said plaintiff the sum of ——— dollars, in full satisfaction and discharge of the said sum of ——— dollars, in the said breach of covenant mentioned, and of all the damages by the said plaintiff sustained, by reason of the non-payment thereof; which said sum of ——— dollars the said plaintiff then and there accepted and received of and from the said defendant, in full satisfaction and discharge of the said sum of ——— dollars, in the said breach of covenant mentioned, and of the damages of the said plaintiff by him sustained, by reason of the said breach of covenant. And this he, the said defendant, is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

J. W. G., Defendant's Attorney.

4. *Plea of License.*

C. D. }
 ats. } ——— Com. Pleas. In Covenant.
 A. B. }

And the said defendant, by E. S., his attorney, comes and defends the wrong and injury, when, &c., and says, [or if the plea of license be preceded by

(a) The plea of *non infregit conventionem* is only applicable to cases where the plaintiff concludes his declaration, "and so the defendant has broken his covenant;" 2 Mod. 811. For if the plaintiff concludes his declaration, "and so the defendant *hath not kept* his covenant," such plea would be bad; for it is a negative to a negative; and no issue is joined, as it is only an answer argumentatively; 8 T. R. 280. And it was admitted in the same case, that where a party covenants to do certain things, and an action is brought against him for *non-performance*, he cannot plead *non infregit conventionem*; for it is of that description; Com. Dig. Pl., 2 v. 5, Story Pl. 213.

Insurance.

another plea say : And for a further plea in this behalf, as to the said supposed breach of covenant [secondly] above assigned, the defendant says] that the plaintiff his action aforesaid ought not to maintain against the defendant, * because he says that he, the said defendant, did commit the said supposed breach of the covenant [secondly] above assigned by leave and license of the plaintiff to the defendant for that purpose first given and granted, to wit, on, [&c.,] at, [&c. *venue*.] aforesaid ; and this the defendant is ready to verify ; wherefore he prays judgment if the plaintiff his action aforesaid ought to maintain, &c.

E. S., Attorney for Defendant.

5. *Pleas on Policies of Insurance.*

Oyer and non est factum.

Wilson and others,	} ——— Com Pleas.
ats.	
Holehouse.	

And the said defendants, by ——— their attorney, come and defend the wrong and injury, when, &c., and say that the said deed-poll or policy of insurance, in the said first count of the said declaration mentioned, and the said deed-poll or policy of insurance, in the said second count of the said declaration mentioned, were and are one and the same deed-poll or policy of insurance, and not other or different ; and they crave oyer of the said deed-poll or policy of insurance, and it is read to them ; and they also crave oyer of the conditions upon which the said company make insurances, which said conditions are referred to by the said deed-poll or policy of insurance, and indorsed thereon, and they are read to them in these words, that is to say, Conditions upon which this company make insurances. *First*: Persons desirous of making insurance on buildings, are to deliver into the office the following particulars, viz., a description of the buildings, where situated, by whom occupied, of what materials the walls and roof of each building intended to be insured are composed ; whether the same are occupied as dwelling houses, or as warehouses, manufactories, workshops, or how otherwise ; houses, not duly separated by party walls, are deemed brick and timber ; all manufactories which contain furnaces, kiln, stores, coal-kels, ovens, or otherwise use fire and heat, are chargeable at, [&c., *setting forth the conditions in full.*] Which being read and heard, the said defendants say that the said, &c., [*non est factum, as ante, 749,*] and of this they put themselves upon the country, &c.

Second plea, that Plaintiff did not give notice of having insured at another office, contrary to fourth condition.

Actio non.]—Because they say that the said plaintiff did not, at the time of making the said policy of insurance in that count mentioned, and at the time

Insurance.

of paying the said sum of, [&c.] in that count also mentioned, give notice to the said company, at the said office of the said other insurance theretofore made, at the Imperial Fire-office, as in the said second count is mentioned, according to the form and effect of the said fourth condition referred to by and indorsed upon the said deed-poll, or policy of insurance; and this, [&c., verification.

Third plea, that Defendant did not waive the notice.

Plea to first count, actio non.—Because they say that they, the said defendants, did not 'in any manner waive, relinquish, release, or discharge the said plaintiff from indorsing the said insurance in the said British Fire-office, in the said deed-poll or policy of insurance, in the said first count first mentioned, and for entering the same at the said office in that count first mentioned, in manner and form as the said plaintiff hath in that count alleged; and of this they, the said defendants, put themselves upon the country, &c.

Fourth plea, that buildings, goods, &c., were not duly described.

Plea to first count, actio non.—Because they say that the said utensils and stock in trade, in the said first count mentioned, were not duly described in the building and place where the same were deposited, but the same were described in the said policy otherwise than they really were, and so as to cause the said insurance to be effected at a lower premium than ought to have been, contrary to the form and effect of the said condition, referred to by and indorsed on the said deed-poll or policy of insurance; and this the said, [&c.] is ready to verify, wherefore, [&c.]

Fifth plea, that goods, &c., were not burnt.

Plea to first count, actio non.—Because they say that the said utensils and stock in trade, in the said first count mentioned, and therein supposed to have been burnt, consumed, lost, and destroyed by fire, were not, nor was any part thereof, burnt, consumed, lost or destroyed by fire, in manner and form as the said, [&c.,] hath in that count alleged; and of this, [&c.]

Sixth plea, that Plaintiff did not give due notice of, or duly prove the loss.

Plea to first count, actio non.—Because they say that the said, [&c.] did not give notice of the loss she had sustained, to the company at their principal office in London, and that the said, [&c.] did not, as soon as possible afterwards, deliver at the said office as particular an account of her said loss or damage as the nature of the case would admit of, in manner and form as the said plaintiff hath above, in that count, alleged; nevertheless, for plea in this behalf, the said, [&c.] in fact, say, that although the said plaintiff did make oath of the said loss, and did then and there produce her books, documents, vouchers, and other evidence, at the request of the directors of the said company, then and there being a reasonable request in that behalf; yet the said plaintiff did not duly, properly, and reasonably, prove her said loss and damage, according to the form and effect of the said seventh condition, referred to by and in-

Insurance.

dorsed on the said deed-poll or policy of insurance ; and this they, the said, [&c.] are ready to verify: Wherefore, [&c.]

Seventh plea, that Plaintiff did not, as soon as possible, deliver in a particular account of loss, and that there was fraud within the seventh condition.

Plea to first count, actio non.—Because they say that the said A. did not, as soon as possible after the said loss and damage in that count mentioned, deliver in as particular an account of such loss or damage as the nature of the case would admit of, in manner and form as the said plaintiff hath above in that count alleged ; nevertheless, for plea in this behalf, the said, [&c.] say that, in the claim made for the said loss and damage, in the said count mentioned and set forth, there appeared to be fraud within the true intent and meaning of the said seventh condition, referred to and indorsed on the said deed-poll or policy of insurance, that is to say, fraud in taking the quantity, nature, and value of the sugars, utensils, and other stock in trade, in that count supposed to have been burnt, consumed, and destroyed by fire, contrary to the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance ; and this, [&c., verification.

Eighth plea, that Plaintiff made a false affidavit of the loss, &c.

Plea to first count, actio non.—Because they say that the said, [&c.] in order to support her claim for the said loss or damage in that count mentioned, did, on, [&c.] before, [&c.] magistrate, at the public office, — in the county of —, make a certain affidavit. And the said, [&c.] in fact, further say that, in support of the said claim for the said loss and damage in that count mentioned, there was false swearing within the true intent and meaning of the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance, that is to say, false swearing in this, to wit, the said, [&c.] then and there swore, that the amount annexed to the said affidavit contained a true statement of the loss and damage of her, the said, [&c.] whereas the said amount did not contain a true statement of the said loss and damage, contrary to the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance ; and this the said, [&c., verification.

Ninth plea, that Plaintiff was requested by directors to deliver in a particular account of loss, but refused, contrary to seventh condition.

Plea to first count, actio non.—Because they say that the said, [&c.] after the said loss and damage by fire, in that count mentioned, to wit, on, [&c.] at, (&c., venue.) was required by the directors of the said company to deliver in an account of the said loss or damage, specifying in such account the amount of the loss and damage suffered, in the stock in trade and utensils, in each distinct building of the said premises, so insured in the said policy in that count mentioned, the same request then and there being a reasonable request in that behalf, but the said, [&c.] then and there neglected and refused to deliver in such account as aforesaid, and hath not delivered the same to the directors of

Leases.

the said company, contrary to the form and effect of the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance; and this, [&c.]

Tenth plea, that stock, &c., was improperly described, whereby insured at a lower premium, contrary to second condition.

Plea to first count, actio non.—Because they say that the said utensils and stock in trade, in the said deed-poll or policy of insurance, in the said last count mentioned, were not truly described in the building and place where the same were deposited, but the same were described in the said policy otherwise than they really were, and so as to cause the said insurance to be effected at a lower premium than ought to have been, contrary to the form and effect of the said second condition, referred to and indorsed on the said deed-poll or policy of insurance; and this, [&c., verification.

Twelfth plea to second count, that the premises were insured in another office, and no notice duly given to Defendant's office.

Plea to second count, actio non.—Because they say that the said utensils and stock in trade in the said sugar-house, in the said last count mentioned, were, before the making of the said deed-poll or policy of insurance, insured for a certain large sum of money, to wit, the sum of — dollars, in a certain office called the British Fire-office, being another office than that mentioned in the said deed-poll or policy of insurance, to wit, at London aforesaid, in the parish and ward aforesaid; and that the said, [&c.] did not give notice of such insurance to the said company at their said office, neither did she cause the same to be indorsed upon the said deed-poll or policy of insurance, but on the contrary thereof, altogether neglected so to do, at, [&c., venue,] aforesaid, contrary to the form and effect of the fourth condition, referred to by and indorsed upon the said deed-poll or policy of insurance, [&c. *Other pleas to the second count, similar to the above pleas to the first count.*

SEC. II. LEASES. See, also, 3 Chitty's Pl. 1019.

6. *Plea that the defendant did repair.*

*Title and commencement as in Form No. 3, to the *, and then as follows:* because he says that he well and sufficiently repaired, sustained, and defended against the wind and rain, the tenement aforesaid, at his own costs and expenses, during the year elapsed of the term aforesaid; and of this he puts himself upon the country, &c.

G. H., Attorney for Defendant.

Leases.

7. *Plea that the premises are not out of repair.*

*Title and commencement as in the preceding Form, No. 3, to the *, and then as follows:*—Because he saith, that [*here deny the breach, in the words assigned in the declaration, which may perhaps be thus:*] the said messuage and tenement, farmhouse and outhouses, thereunto belonging, were not, nor are, nor was, nor is any part thereof ruinous, prostrate, fallen down, or out of repair, in manner and form as the said plaintiff hath above thereof complained against him, the said defendant; and of this he, the said defendant, puts himself upon the country, &c.

8. *Plea of tender of rent in covenant.*

C. D. }
 ads. } ——— Com. Pleas.
 A. B. }

And the said C. D., defendant in this suit, by G. H. his attorney, comes and defends the wrong and injury, when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said sum of — dollars, because he says that he, the said defendant, was present at the said demised dwelling house at the time when the said — dollars became due as aforesaid, to wit, on, [&c.] for a reasonable time, to wit, the space of one hour before sunset, and there continued until a reasonable time, to wit, one hour after sunset on the same day, and during all the interval of time aforesaid, was there ready to pay the said — dollars to him the said plaintiff; but that neither the said plaintiff, nor any other person on his behalf during the said time or any part thereof, was there ready to receive the same; and the said defendant further saith, that since the said day he hath always been, and still is ready to pay the said — dollars to the said plaintiff, to wit, at, [&c.] and he now brings the said — dollars here into court, ready to be paid to the said plaintiff, if he will accept the same; all which he is ready to verify: Wherefore he prays judgment if the said plaintiff ought to have or maintain his said action thereof against him, the said defendant, to recover any more or greater damages than the said sum of — dollars, in this behalf, &c.

9. *Replications in covenant.*

For similiter, see ante, p. 639. For commencement and conclusion, see ante, p. 642.

License.

Replication to plea of license.

A. B. }
v. } ——— Com. Pleas. In Covenant.
C. D. }

And the said plaintiff as to the said plea of the said defendant, by him [secondly] above pleaded, saith that the plaintiff, by reason of any thing in that plea alleged, ought not to be barred from maintaining his said action against the defendant, because he says that the said defendant, of his own wrong and without the leave or license of the plaintiff to the defendant, for that purpose given and granted, did, [*here enumerate the acts complained of, as in the declaration.*] and this the plaintiff prays may be inquired of by the country; and the defendant doth the like, &c.

G. H., Attorney for Plaintiff.

CHAPTER VIII.

PLEAS IN DETINUE.*

General issue non detinet.

C. D. }
ats. } ——— Com. Pleas. In Detinue.
A. B. }

And the said defendant, by E. F. his attorney, comes and defends the wrong and injury, when, &c., and saith that he doth not detain the said, [goods and chattels,] in the said declaration mentioned, or any or either of them, or any part thereof, as the plaintiff hath complained; and of this the defendant puts himself upon the country. And the plaintiff doth the like, &c.

E. F., Attorney for Defendant.

(a) This action is nearly obsolete in Ohio. For pleas, see 3 Chit. Pl. 1023.

CHAPTER IX.

PLEAS, REPLICATIONS, &c. IN CASE.

1. General issue in case or trover by one defendant.
2. The like by several defendants.
3. Plea of the statute of limitations.
4. Accord and satisfaction.

1. *General Issue in case or trover by one Defendant.*^b

A. B. }
ats. } ——— Common Pleas. In Case.
C. D. }

And the said defendant, by E. F., his attorney, comes and defends the wrong and injury, when, &c., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him. And of this he, the said defendant, puts himself upon the country, &c.

2. *The like by several Defendants.*

C. D. and others. }
ats. } ——— Com. Pleas. In Case.
A. B. }

And the said defendants, by ———, their attorney, come and defend the wrong and injury, when, &c., and say that they are not, nor is either of them, guilty of the said supposed grievances above laid to their charge, or any, or either, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them. And of this they put themselves upon the country, &c.

(a) For special pleas in libel and slander, see next chapter. For other pleas and replications, see ante Chapter V., p. 655.

(b) In trespass on the case the defendant may, in general, give almost any matter of defence in evidence under the general issue, except the statute of limitations and justification of a libel or slander. 1 Chitt. Pl. 535 ; 10 Johns. Rep. 291. But still the defendant may plead specially any thing which, admitting the plaintiff once had a cause of action, goes to discharge it —such as a release, accord and satisfaction, bankrupt discharge, &c. 19 Wend. 463; 1 Chitt. Pl. 536; 6 Hill (N. Y.) 114.

3. *Plea of the Statute of Limitations.**

First plea general issue, as supra ; second plea actio non, as ante 643, form 6.] Because he says that the said several supposed causes of action, in the said declaration mentioned, did not, nor did any or either of them, accrue at any time within [six] years next before the commencement of this suit, in manner and form as the said plaintiff hath above thereof complained against him, the said defendant. And this, [*&c., conclude with a verification, as ante, p. 641, form 4.*

4. *Accord and Satisfaction.*

First plea general issue, as ante 758 ; second plea actio non, as ante 643, form 6.] Because he says that after the committing of the said grievances as aforesaid, and before the commencement of this suit, to wit, on, [*&c.,*] at, [*&c. venue,*] aforesaid, he, the said defendant, paid to the said plaintiff the sum of — dollars, for, and in full satisfaction and discharge of the said grievances in the said declaration mentioned, and which said sum of — dollars he, the said plaintiff, then and there accepted and received of and from the said defendant, in full satisfaction and discharge of the said grievances. And this, [*conclude with a verification, as ante, p. 641, form 4.*]

(a) See pleas, &c. of statute of limitations, ante, p. 696.

CHAPTER X.

PLEAS, &c., IN LIBEL AND SLANDER.

1. General issue of not guilty.
 2. Plea of justification of words of theft, that plaintiff was guilty of theft.
 3. Plea of justification of words of perjury that the plaintiff was guilty of perjury.
 4. Plea of justification of words of insolvency that plaintiff was insolvent.
 5. Plea of justification of words of perjury that plaintiff in an answer to a bill in Chancery was guilty of perjury.
 6. Replication to the general issue, [similiter,] and to the plea justifying the words.
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1. *General Issue of not Guilty.*

The form of this plea has been already given, ante p. 758, form 1.

2. *Plea of Justification of words of Theft, that Plaintiff was guilty of Theft.*

First plea general issue as ante p. 758, form 1 ; second plea as follows :
And for a further plea in this behalf, [if the plea is intended to justify the words in particular counts only, here say : As to the speaking and publishing of and concerning the plaintiff, the following words in the declaration mentioned, to wit, — ; or in case of libel in part justified, state as to the composing and publishing of and concerning the plaintiff, the following part of the said supposed libellous matters in the declaration mentioned ; or, so much of the said libel as imputes to the plaintiff perjury,] the defendant saith that the plaintiff ought not to maintain his aforesaid action thereof against him, * because he says that the plaintiff, before the said time, when, &c., to wit, on, [&c.,] at, [&c.,] feloniously did steal, take and carry away certain goods and chattels, to wit, —, of one E. F., of great value, to wit, — dollars, wherefore the defendant at the said time, when, &c., committed the said supposed grievance in the declaration mentioned, [or if the plea be to part, say, in the introductory part of this plea mentioned,] as he lawfully might for the cause aforesaid ; and this the defendant is ready to verify.

Justification.

Wherefore he prays judgment if the said plaintiff ought to maintain his aforesaid action thereof against him, &c.

E. G., Attorney for Defendant..

3. *Plea of Justification of words of Perjury, that the Plaintiff was guilty of Perjury.*

*Follow the directions and the preceding form to the *, and then proceed as follows:]* because he says, that before the speaking and publishing the said words of and concerning the said plaintiff, [in the said — counts mentioned,] to wit, on, [&c.,] at, [&c., venue,] at the Court of Common Pleas then and there holden, a certain issue before then joined in an action brought and prosecuted in the said court, before the judges thereof, by and at the suit of one E. F., as the plaintiff, against one G. H., as the defendant, for the supposed breach of certain promises and undertakings alleged by the said E. F. to have been made to him by the said G. H., and not performed, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf, duly taken and sworn between the parties aforesaid, and upon such trial of the said issue the said plaintiff appeared as a witness for and on behalf of the said E. F., the plaintiff in the said action, and the said plaintiff was then and there in open court, holden as aforesaid, before the said judges aforesaid, by the clerk of said court, duly sworn, and took his corporal oath to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue, (the said clerk then and there having sufficient and competent power and authority to administer the said oath to the said plaintiff in that behalf;) and upon the said trial of the said issue, it then and there became and was material to ascertain the truth of the matters hereafter stated to have been sworn to by the said plaintiff; and the said defendant further says, that the said plaintiff being so sworn as aforesaid, upon his oath aforesaid, then and there, to wit, on, [&c.,] aforesaid, at, [&c., venue,] aforesaid, falsely, wickedly, wilfully, maliciously and corruptly, and by his own act and consent, did say, depose, swear, and give evidence, amongst other things, at and upon the said trial, to and before the said jurors so sworn, to try the said issue as aforesaid, and the judges aforesaid, that, [&c.; here state that part of the plaintiff's evidence in which he committed perjury;] whereas, in truth and in fact, [&c.; here negative the plaintiff's evidence as in an indictment for perjury;] and the said plaintiff did thereby in the said court at — so holden as aforesaid, upon his oath upon the trial of the said issue, falsely, wickedly, wilfully and corruptly, commit wilful and corrupt perjury; wherefore the said defendant, at the said several times, when, &c., in the said — counts mentioned, at, [&c., venue,] aforesaid spoke and published of and concerning the said plaintiff, the said several words in the said — counts mentioned to have been spoken and published by the said defendant of and concerning the said plaintiff, as it was

Justification.

lawful for him to do for the cause aforesaid; and this, [*&c.*; *conclude with a verification, &c., as in the preceding form.*

4. *Plea of Justification of words of Insolvency, that Plaintiff was Insolvent.*

*Follow the directions and the preceding form, ante, p. 760, form 2, to the *, and then proceed as follows:*] because he says, that the said plaintiff, at the said several times when, &c., in the said — counts mentioned, at, [*&c., venue,*] aforesaid, was in bad and indigent circumstances, and incapable of paying his just debts, to wit, a certain just debt, amounting to a large sum of money, to wit, the sum of — dollars, which he then and there owed to one E. F., for, [*&c.*; *here state generally the subject matter of the debt;*] and a certain other just debt, amounting to a large sum of money, to wit, the sum of — dollars, which he, the said plaintiff, then and there owed to one G. H., [*&c., enumerating as many debts as can be proved to have been long in arrear,*] and which said several debts the said plaintiff was then and there unable to pay; and this, [*conclude with a verification, as ante, p. 760, form 2.*

5. *Plea of Justification of words of Perjury, that Plaintiff, in an answer to a Bill in Chancery, was guilty of Perjury.*

*Follow the directions and the preceding form, ante, p. 760, form 2, to the *, and then proceed as follows:*] because he saith, that the said defendant, before the committing of the said several supposed grievances in the said declaration mentioned, or any of them, to wit, on, [*&c.*] did exhibit his bill of complaint in writing in and on the Chancery side of the Court of Common Pleas, in and for the county of —, against the said plaintiff, directed to the said court, alleging that he had from time to time accommodated the said plaintiff with divers loans, bills of exchange, and drafts, in the said bill mentioned, and praying, (amongst other things,) for a discovery, and that an account might be taken of the several transactions, drafts, or bills of exchange, matters and things in the said bill of complaint mentioned, and of divers acts between the said defendant and the said plaintiff, and that the said plaintiff might, in the mean time, be restrained by the injunction of the said court, from suing out any execution in a certain action at law, before then commenced by the said plaintiff against the said defendant, in the said Court of Common Pleas of — county, in a certain plea of trespass on the case, in the said bill of complaint more particularly mentioned, as in and by the said bill of complaint of the said defendant, remaining duly affiled in the said court aforesaid, in the said county of —, more fully appears; and the said defendant further says, that the said plaintiff afterwards, to wit, on, [*&c.*] aforesaid,

Justification.

at — aforesaid, in the county of —, came before B. G., esquire, a justice of the peace in and for the township of —, in said county, and then and there, before the said B. G., exhibited and produced the answer in writing of him, the said plaintiff, and was then and there in due form of law, sworn before the said B. G., then and there being a justice of the peace as aforesaid, and then and there having sufficient and competent power and authority to administer an oath to the said plaintiff in that behalf, touching and concerning the said matters and things contained in the said answer; and that the said plaintiff, not having the fear of God before his eyes, and minding and intending unjustly to aggrieve the said defendant, did then and there, at — aforesaid, upon his oath aforesaid, in his answer aforesaid, before the said B. G., then and there being such justice, and then and there having such sufficient and competent power and authority as aforesaid, knowingly, falsely, wickedly, maliciously, wilfully and corruptly, by his own act and consent, did, (amongst other things,) answer, swear and affirm, in writing, in substance and to the effect following; to wit, [*set out the answer fully, with the necessary inuendoes,*] as by the said answer of the said plaintiff remaining duly filed in the said Court of Common Pleas aforesaid, in the said county of —, more fully appears; whereas in truth and in fact the said plaintiff had been and was, [*&c., denying and contradicting all the positions in the answer, as in the bill is mentioned,*] to wit, at — aforesaid, in the county aforesaid; and the said plaintiff, when he so deposed and swore to the truth of the said answer as aforesaid, then and there, to wit, at —, in the county of —, well knew the said several matters and things aforesaid, so sworn by him as aforesaid, to be false and untrue; and whereas in truth and in fact the said defendant did give, [*&c., denying the answer, as in the said answer is alleged,*] and the said plaintiff, when he so deposed and swore in that behalf as aforesaid, then and there, to wit, at — aforesaid, well knew and believed that the said bill was given as a loan or accommodation to him as aforesaid; and whereas in truth and in fact the said plaintiff did, [*&c.; denying answer, and asserting that plaintiff perjured himself throughout all the positions of the answer;*] and the said defendant further says, that on the occasion of the said plaintiff so swearing and deposing as aforesaid, it became and was material, for the purposes of the said suit, to ascertain the truth of the matter so by him sworn and deposed to as aforesaid; and the said defendant says, that the said plaintiff on, [*&c.*] at [*&c. venue*] aforesaid, before the said B. G. (then and there being one of the justices of peace in and for said township of —, in said county, and then and there having competent power and authority to administer the said oath to the said plaintiff,) did knowingly, falsely, wickedly, maliciously, wilfully, and corruptly, in manner and form aforesaid, commit wilful and corrupt perjury, to the great damage of him the said defendant, to the evil example of others, and against the peace of the State of Ohio; wherefore the said defendant, at the said several times when, &c. the same and every of them being after the commission of the said perjury by the said plaintiff as aforesaid, pub-

Replication to plea of Justification.

lished the said supposed libel, and spoke and published the said several words in the said declaration mentioned, as it was lawful for him to do, for the cause last aforesaid,^a [with this, that the said defendant doth aver that the said bill and answer herein before mentioned, are respectively one and the same bill and answer, and not other and different, and which said answer was sworn to before the said B. G. in manner aforesaid, and not at — aforesaid, or elsewhere, of the county of —, as aforesaid.] And this, [*conclude with a verification, as ante, p. 760, form 2.*]

6. *Replication to the general issue (similiter) and to the pleas justifying the words.*

A. B. }
vs. } ——— Com. Pleas. In Case.
C. D. }

And the plaintiff as to the plea of the defendant by him first above pleaded and whereof he hath put himself upon the country, doth the like. And as to the said pleas of the said defendant, by him [secondly and thirdly] above pleaded, the said plaintiff saith, that he, by reason of any thing by the said defendant in those pleas above alleged, ought not to be barred from having and maintaining his aforesaid action against the said defendant, in respect of the grievances in the introductory part of those pleas mentioned; because he saith, that the said defendant, at the said time when, &c., in the said [first and second] counts mentioned, of his own wrong, and without the cause by the said defendant, in his said [second and third] pleas, or either of them respectively mentioned, did commit the said grievances in the introductory part of those pleas mentioned, in manner and form as the said plaintiff hath above thereof complained against the said defendant, to wit, at, [*&c., venue*] aforesaid. And this the said plaintiff prays may be inquired of by the country, &c.; and the defendant doth the like, &c.

E. F., Attorney for Plaintiff.

(a) The averment in brackets seems unnecessary.

CHAPTER XI.

PLEAS, &c., IN TRESPASS.

SECTION I. GENERAL PLEAS.

1. Plea of the general issue.
2. Not guilty as to part of the trespasses.
3. Plea of tender of amends.
4. Payment of money into court as to part of trespasses.

II. PLEAS, &c., IN TRESPASS TO THE PERSON.

5. Plea of son assault demesne.
6. Replication of excess to a plea of son assault demesne.
7. Replication by way of general traverse.
8. Replication—new assignment, that the action was brought for a different assault.
9. Plea mollitur manus impositum to keep the peace.
10. Plea to a declaration for an assault and battery, that they were committed by defendant as servant of the occupier of a house, to expel plaintiff, showing that he resisted and assaulted the defendant.
11. Plea that a burglary had been committed in defendant's house, that plaintiff was found near the house, wherefore the defendants, one being a constable, took him before a magistrate, who remanded him, &c.
12. Plea—taking plaintiff to a police station and before a magistrate;—plea under the city charter, that the plaintiff was found in defendant's house under suspicious circumstances.
13. Plea that plaintiff came to the defendant's house in the night, and refused to leave, whereupon defendant attempted to turn him out, and on his resistance, &c., caused him to be taken to a police station, and the next morning before a magistrate.
14. Plea (in trespass for imprisonment, &c., against a sheriff) justifying under a writ of *capias* against a third person, whom the plaintiff fraudulently personated.
15. Replication *de injuria*, &c., to a plea of justification under process.
16. Plea of justification under a warrant of a magistrate for an assault.

17. Plea of justification of imprisonment, &c., of plaintiff, on suspicion of stealing.
18. Plea—Correction of an apprentice for disobedience.
19. Plea—That the plaintiff was unlawfully in the defendant's dwelling house.
20. Plea—Assault, &c., in defence of the possession of a close.

III. PLEAS, &c., IN TRESPASS TO PERSONALTY.

21. Plea of property in the defendant, &c.
22. Replication to plea of property in the defendant.
23. Plea of removal of goods, damage feasant (in trespass de bonis asportatis.)
24. Justification of entrance into plaintiff's house and seizing his goods under a *fi. fa.* against him.
25. Justification of killing a dog.

IV. PLEAS, &c. IN TRESPASS TO REALTY.

26. Plea of *liberum tenementum*.
27. New assignment setting out abutments.
28. Plea to new assignment—general issue and special plea.
29. Plea of license.
30. Public way.
31. Private way.
32. Plea of escape of cattle by defect of fences.
33. Replication thereto by way of special traverse.
34. Replication that the defendant turned the cattle into the *locus in quo*.
35. Rejoinder that the cattle escaped by defect of fences.
36. Plea justifying entering plaintiff's close and taking away gelding, that plaintiff had forcibly taken it away from the defendant.
37. Plea justifying defendant's entering close, &c. because the highway was impassable.
38. Plea (to trespass for lopping, &c. trees,) that they overhung, &c. the plaintiff's grounds.
39. Plea (in trespass for entering colliery, &c.) that the defendant demised it to the plaintiff, with a power of re-entry if the rent was not paid, and justifying under such power.
40. Rejoinder (to a replication of demise to plaintiff,) notice to quit.
41. Surrejoinder that notice to quit was waived.
42. Rebutter denying waiver of notice to quit.
43. Surrebutter (similiter.)

1. *Plea of the general Issue.**

C. D. }
ats. } ——— Com. Pleas. In Trespass.
A. B. }

And the said defendant comes and defends, &c., and says that he is not guilty in manner and form as the said plaintiff hath complained against him; and of this he puts himself upon the country, and the plaintiff doth the like.

J. S., Attorney for Defendant.

2. *Not guilty as to part of the Trespasses.*

C. D. }
ats. } ——— Com. Pleas. In Trespass.
A. B. }

And the defendant, by E. F., his attorney, comes and defends, &c., as to the said supposed [assaulting, beating, (&c. or) breaking and entering the said close in which, (&c.,) and (&c. or,) seizing and taking the said, (&c.,) *enumerating the particular trespasses which are denied,*] saith that he is not guilty of the said last mentioned trespasses, or of either of them, or any part thereof, in manner and form as the said plaintiff hath complained against him; and of this the defendant puts himself upon the country, &c.; * and as to the residue of the said supposed trespasses in the declaration mentioned, the defendant says that, [&c.]

3. *Plea of Tender of Amends.*

Actio non, as ante, 640, form 1. — Because he says, that he the said defendant, at the said times when, [&c.] had not, nor claimed to have, nor hath he, nor doth he now claim to have, but disavoweth and disclaimeth to have any title or interest in the said closes, in which, [&c.] and the said defendant further saith, that the said cattle in the said declaration mentioned, a little before

(a) In trespass, whether to the person or to personal or real property, if the matter of defence goes to deny that any trespass was in fact committed, the general issue should be pleaded and the matter given in evidence under it. 1 Chitt. Pl., 538. But where the act complained of is *prima facie* a trespass, and the defence consists of matter in justification or excuse of the trespass, or in discharge of the cause of action, as a release, former recovery, the statute of limitations, or the like, it must be specially pleaded. 1 Chitt. Pl. 538; 7 Cowen, 35; 20 Johns. Rep. 427; 1 Tidd's Pr. 652, 653.

In trespass to real property, if the plaintiff was not in possession of the land, (or in case the land was wild or unoccupied, if the plaintiff had no title,) the defence or other evidence of right and title may be given in evidence under the general issue. *Id.* *Ib.*

So, in trespass to personal property, the defendant, under the general issue, may show that the plaintiff had no property in the goods. *Id.* *Ib.*

Payment into Court.

any of the said times when, [*&c.*] had, without the knowledge and against the will of the said defendant, strayed and escaped into the said closes of the said plaintiff, in which, [*&c.*] and at the said times when, [*&c.*] were in the said closes, in which, [*&c.*] doing damage there as in the said declaration is mentioned; wherefore he the said defendant, as soon as he had knowledge thereof, to wit, at the said several times when, [*&c.*] in order to prevent further damage there to the said plaintiff, and to drive his said cattle out of the said closes, entered the said closes, in which, [*&c.*] by the most convenient and proper ways there, for the purpose of driving the said cattle out of the said closes, and then and there at the said times when, [*&c.*] did drive them out of the said closes of the said plaintiff, in which, [*&c.*] by the most proper and convenient ways there, as it was lawful for him to do, he doing as little damage on those occasions as he possibly could, and in so doing he the said defendant, with his feet in walking, necessarily and unavoidably trod down, trampled upon, consumed, and spoiled, a little of the oats of the said plaintiff, there then growing and being; which are the same trespasses in the said declaration mentioned, and whereof the said plaintiff hath above thereof complained against the said defendant. And the said defendant further saith, that after the committing of the said several trespasses, before the commencement of this suit, to wit, [*&c., day of tender or about it,*] at, [*&c., venue*] aforesaid, the said defendant tendered and offered to pay to the said plaintiff the sum of — dollars, in full satisfaction of the said several trespasses in the said declaration mentioned, the said sum of — dollars, then and there being sufficient amends for the said trespasses, which said sum of money the said plaintiff then and there wholly refused, and still doth refuse to accept of the said defendant. And this, [*&c., conclude with a verification as ante, 641, form 1.*]

4. *Payment of money into Court as to part of Trespasses.*

*Proceed as ante, p. 767, form 2, as to the trespass denied, to the * and then as follows:*—And as to the residue of the trespasses in the declaration mentioned, the defendant says, that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of — dollars, ready to be paid to the plaintiff, and — dollars, the costs herein that have accrued, and the defendant further says, that the plaintiff *has not sustained* damages to a greater amount than the said sum of — dollars in respect of the causes of action in the introductory part of this plea mentioned; and this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought further to maintain his action as to the last mentioned causes of action.

E. F., Attorney for Defendant.

To the person.

SEC. II. PLEAS, &c., IN TRESPASS TO THE PERSON.

5. *Plea of son assault demesne.*

C. D. }
 ads. } ——— Com. Pleas. In Trespass.
 A. B. }

And the said C. D. comes and defends, &c., and says, that as to the force and arms, and whatever is against the peace, he is not guilty thereof, in manner and form as the said A. B. hath above complained against him: and of this he puts himself upon the country, and the said A. B. doth the like, &c.

And as to the residue of the trespass aforesaid, above supposed to be committed, the said C. D. says, that the said A. B. his action aforesaid against him the said C. D. ought not to have, because he says, that at the time and place when and where the said trespass is above supposed to have been committed, to wit, on, [*&c.*] at, [*&c.*] he the said A. B., with force of arms upon him the said C. D., did make an assault, and him the said C. D. did then and there beat, bruise, and would have further beaten, bruised and wounded him; wherefore he the said C. D. did then and there defend himself against the said A. B., which is the residue of the trespass whereof the said A. B. complains as aforesaid; and so the said C. D. says, that the damage or injury, if any then and there happened to the said A. B., was from the assault of the said A. B. upon him the said C. D. and in his defence; and this he is ready to verify; wherefore he prays judgment if the said A. B. ought his action aforesaid to have against him, &c.

G. H., Attorney for Defendant.

6. *Replication of Excess to a plea of son assault demesne.*

A. B. }
 vs. } ——— Com. Pleas. In Trespass.
 C. D. }

And the said plaintiff as to the said [second] plea, says that he ought not to be barred from maintaining his said action by reason of any thing in that plea alleged,* because he says that the defendant at the said time when, &c., of his own wrong committed the trespasses in the said declaration mentioned to a greater degree and extent, and with more force and violence than was necessary for the purpose in the said [second] plea mentioned, in manner and form as the plaintiff hath above complained, and this the plaintiff is ready to verify; wherefore he prays judgment and his damages, &c., to be adjudged, &c.

J. S., Attorney for Plaintiff.

To the person.

7. Replication by way of general traverse.*

A. B. }
vs. } ——— Com. Pleas.
C. D. }

And the said plaintiff, as to the said plea of the said defendant by him [secondly] above pleaded, as to the said several trespasses in the introductory part

(a) The general replication *de injuria*, as it is termed, is, when appropriate, an advantageous form of reply for a plaintiff where he has no *new matter* to produce in answer to the plea, and rests his case upon a denial of the defendant's allegations. It amounts to a general traverse of all the material matters of fact in the plea constituting the *cause* or point of justification; it puts in issue the *whole* cause; see *Kerbey v. Denby*, 1 M. & W. 336; *Penn v. Ward*, 2 C. M. & R. 338. See in general the observations of the Court in the late cases deciding *de injuria* to be a good replication in *assumpsit* where the plea consists of matter of excuse; and *Steph.* 3d ed. 163.

The leading authority upon this form of replication is *Crogate's case*, 8 Co. R. 67. See comments, &c. thereon, per *Tindall, C. J.* in *Bardons v. Selby*, 1 C. & M. 500; 3 Tyr. 430; 3 B. & Ad. 2; 9 Bing. 756, S. C. In *Crogate's case* the defendant, in an action of trespass for driving the cattle of the plaintiffs, pleaded a right of common in a copyholder over the *locus in quo*, by prescribing in the usual way in the name of the lord of the manor, and because the plaintiff had wrongfully turned his cattle there, the defendant, as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied *de injuria propria abque tali causa*, and upon demurrer it was adjudged that the general replication in that case was insufficient; and Lord Coke then proceeds to lay down four resolutions of the Court, in the course of which he thus states the nature of this general plea, viz. the general plea *de injuria sua propria*, &c. is proper when the defendant's plea doth consist merely of *matter of excuse* and of no matter of *interest* whatever. The resolutions of the Court are these four—*first*, that *abque tali causa*, doth refer to the *whole* plea, and not only to the commandment, for all makes but one cause, and any of them without the other is no plea by itself; *secondly*, it was resolved, that when the defendant in his own right, or as servant of another, claims any *interest* in the land,

or to any common or rent going out of the land, &c. there *de injuria sua propria*, &c. generally is no plea, but if the defendant justifies as servant, there *de injuria sua propria*, &c. in some of the cases with a traverse of the commandment, that being made material, is good; *thirdly*, it was resolved, that when by the defendant's plea any *authority or power* is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer and shall not reply generally *de injuria sua propria*. The same law of an authority given by law as to view waste, &c. *Lastly*, it is resolved, that in the case at bar the issue would be full of multiplicity of matter where an issue ought to be full and single for parcel of the manor demisable by copy grant, by copy prescription, of common, &c. and commandment will be all parcel of the same.

The general traverse *de injuria* is applicable (we have seen) in *assumpsit* and other forms of action (including replevin, *Bardons v. Selby*, *ubi supra*), where the plea is founded on matter of excuse, and does not fall within either of the other exceptions laid down in *Crogate's case*. In trespass to persons it is a good answer to a plea of son assault demesne, or other justification not founded on process out of a Court of record (*Crogate's case*); or justifying in defence of property, to which a title and not mere possession is shown; *Vivian v. Jenkin*, 3 Ad. & E. 741. In trespass to goods, *de injuria* generally will not be a good replication, where the plea justifies under a *feri facias*, &c. out of a Court of record, or the removal of goods from land to which a title is shown; but it suffices where the plea justifies the seizure under a magistrate's warrant for a poor's rate; *Bardons v. Selby*, *supra*; and in most cases where no property is claimed in the goods anterior to the seizure and the defence is matter of excuse.

In trespass to land, *de injuria* generally is a bad replication (on general demurrer) where the defendant claims an *interest* in the land or a title thereto, or a right of way or common, &c. or

To the person.

of that plea mentioned, and therein attempted to be justified, says, that the said plaintiff, by reason of any thing by the said defendant in that plea alleged,

justifies an entry thereon to distrain for rent; *Hooker v. Nye*, 1 C. M. & R. 258; 4 Tyr. 777; or under process of a court of record.

In all these cases the circumstance of the defendant justifying as *servant* of a third person does not prevent the plaintiff from replying *de injuria* generally; see *Piggott v. Kemp*, 1 C. & M. 197; *Bardons v. Selby*, *supra*.

It is frequently advantageous and proper to admit such parts of the plea as prevent the plaintiff from replying *de injuria* generally, as the process and warrant; the judgment stated to have been obtained; the fiat in bankruptcy alleged to have been issued; or the seisin in fee, &c.; and reply *de injuria*, &c. as to the *residue* of the cause, &c.; see an instance and form, herein, *post*. But where the *cause* of excuse stated in the plea is true, the plaintiff cannot safely reply *de injuria*, and must, where he relies on an *excess*, or trespass committed at another time, in general reply or new assign such excess or other trespass; see *Penn v. Ward*, 2 C. M. & R. 338; 1 Gale, 189, S. C. The case of *Price v. Peek* and others, 1 Bing. N. C. 360; 5 M. & Sc. 205, clearly explains this principle. That was an action of trespass against bailiff and sheriff for taking the plaintiff on a charge of felony to a police station, and thence to a prison. The sheriff, after pleading not guilty, justified the taking from the police station to the prison under a *ca. sa.* The plaintiff, admitting the writ and the delivery of the warrant to the bailiff, replied *de injuria absque residuo causæ*. Held, that under this replication he could not give evidence to involve the sheriff in the misconduct of the bailiff, committed before the plaintiff arrived at the police station, (namely, the charging the plaintiff with felony, and having him detained on that charge); and that in order to the admission of such evidence, the circumstances should have been replied or new assigned specially. Tindal, C. J. in delivering judgment, said, "the traverse, *de injuria sua propria absque residuo causæ*, puts nothing in issue but each and every fact alleged in the special plea, and not admitted in the replication. In this case it puts nothing in issue but whether the assault and imprisonment mentioned in the plea were committed under color of the writ and warrant or not. It is true that under the authority of the case of *Lucas*

v. Nockels, 10 Bing, 155, the plaintiff may show under that traverse that the sheriff did not act under the writ at all; that although he had it in his possession, he acted at the time for a purpose and with an object entirely distinct from the execution of the writ, and that he only avails himself of it at the trial as an excuse for an illegal act. But there is no authority in that case or any other, that where the sheriff has really acted under the writ at the time, and avails himself of it in his plea, the plaintiff shall be at liberty under this replication to give antecedent matter in evidence to render the subsequent arrest under the writ illegal. Such a reply, as it appears to us, confesses the arrest stated in the plea to have been made under the writ, but avoids it by new matter of fact; and therefore, like any other matter of confession and avoidance, must be specially pleaded. It is well established, that where the plaintiff seeks to avoid any legal excuse for a trespass, by showing matter subsequent, which makes the defendant a trespasser *ab initio*, he is bound to plead such matter, and cannot take advantage of it under the general traverse, *de injuria* &c.; see the authorities collected in 1 Saund. 300 d, in note; and the case appears to us to be the same upon principle, whether the act done by the defendant is precedent or subsequent to the execution of the writ, and the reason is undoubtedly the same in each case, viz. that the defendant ought not to be taken by surprise at the trial."

Declaration of two counts for assault and imprisonment. Plea, that defendant being bail for plaintiff, arrested him to render him in discharge, and detained him till he had satisfied the demand in the action. Replication *de injuria*. It appeared that defendant in addition to detaining plaintiff till he satisfied the demand in the action, detained him *an hour longer*, till he paid the expenses of the defendant becoming bail, &c. Held, that this was *one continuing trespass*, and that therefore, in order to recover for that part of it which was unjustifiable, (namely, the additional detention for the bail's expenses) the plaintiff ought to have newly assigned; *Lambert v. Hodgson*, 1 Bing. 317; 8 Moore, 826. But, where there are two distinct assaults, &c., and a count for each; and one assault is open to a justification, the other not; if the defendant plead a

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ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he says, that the said defendant at the said time, when, &c., of his own wrong, and without the cause by him in his said [second] plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the said plaintiff hath above, in [the said first count of] his said declaration, complained against the said defendant. And this the said plaintiff prays may be inquired of by the country, &c.

E. F., Attorney for Plaintiff.

8. *Replication—New Assignment, that the action was brought for a different assault.*

A. B. }
vs. } ——— Com. Pleas.
C. D. }

And the said plaintiff, as to the said plea of the said defendant, by him [secondly] above pleaded as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, says that he, the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said defendant, because he says, that he, the said plaintiff, exhibited his said bill against the said defendant, and brought his suit thereupon, not for the trespasses in the introductory part of the said [second] plea mentioned, but for that the said defendant, on the said — day of — in the year of our Lord one thousand eight hundred and — with force of arms, &c., at, &c., [the venue] aforesaid, upon another and different occasion, and for an-

justification to one count, the plaintiff should enter a *nolle prosequi* upon one count, or if he dispute the justification should reply *de injuria* &c.; and must not new assign: he should proceed for the other trespass on his other count; see *Atkinson v. Matteson*, 2 T. R. 172, 177; 1 Saund. 299, n. 6.

But in general a new assignment is unnecessary, and *de injuria* suffices when the defendant cannot prove the whole of the facts he pleads to the several trespasses he professes to justify, and which constitute the substance of his defence to those trespasses; see *post* 774, *note to form* 10.

Thus in a plea to a declaration for breaking and entering, assaulting, &c. justifying an entry and arrest under a *ca. sa.*, the averment of the *outer door being open* is necessary and material; and is well traversed under the replication of *de injuria absque residuo causa*, and the defendant

will fail if that fact be negatived, although the rest of the plea be supported by the evidence; *Kerby v. Denby*, 1 M. & W. 336.

Where *de injuria* is inadmissible by reason of the plea claiming an interest in land, &c. the replying it has been held to be a defect in substance, so that a demurrer thereto may be *general*; *Hooker v. Nye*, *ubi supra*; see 1 Chit. Pl. 8th ed. 610. The error would be cured by verdict; *id.* It is usual to demur specially in this instance.

A replication *de injuria* in trespass, with a new assignment that the defendant committed the trespasses with more violence and in a greater degree than was necessary for the purposes in the plea mentioned, is specially demurrable for duplicity; *Thomas v. Marsh*, 5 C. & P. 596; *Gisborne v. Wyatt*, 1 Gale, 35; 3 Dowl. P. C. 505. S. C.

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other and different purpose than in the said plea mentioned, made another and different assault upon the said plaintiff than the assault in the said [second] plea mentioned, and then and there beat, bruised, wounded and ill-treated the said plaintiff, [*this must correspond with the averments in the declaration*] in manner and form as the said plaintiff hath above thereof complained against the said defendant; and which said trespasses above newly assigned, are other and different trespasses than the said trespasses in the said [second] plea mentioned. And this the said plaintiff is ready to verify. Wherefore, inasmuch as the said defendant hath not answered the said trespasses above newly assigned, the said plaintiff prays judgment and his damages by him sustained, on occasion of the committing thereof, to be adjudged to him, &c.

E. F., Attorney for Plaintiff.

9. *Plea Molliter manus imposuit to keep the peace.*

C. D. }
 ads. } ——— Com. Pleas.
 A. B. }

First plea, general issue, as ante, 767; second plea as follows: — And for a further plea in this behalf, as to the said assaulting, [*“beating,”*] and ill-treating the said plaintiff as in the said [first] count mentioned, [*or otherwise, according to the statements in the declaration,*] the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said plaintiff and one R. N. at the said time when, [*&c.*] at, [*&c. the venue*] aforesaid, were fighting together, and striving with force and arms to beat and wound each other, against the peace of the State of Ohio; whereupon, the said defendant, being then and there present, for the preservation of the peace of the said State, and that the said plaintiff, and the said R. N., might do no hurt to each other, and in order to separate and part them, then and there gently laid his hands upon the said plaintiff, as he lawfully might, for the cause aforesaid: which are the said assaulting, [*“beating,”*] and ill-treating the said plaintiff, in the said [first] count of the said declaration mentioned, [*or, “which are the said supposed trespasses in the introductory part of this plea, and in the said declaration mentioned,”*] and whereof he, the said plaintiff, hath above thereof complained against him, the said defendant. And this he is ready to

(a) This plea is not a full answer to a declaration charging an assault and *wounding*; and if issue be taken upon such a plea and found for the defendant, it still leaves a part of the declaration unanswered, and judgment must be rendered for

the plaintiff *non obstante veredicto*, 17 Ohio Rep. 456. The plea in such case should either deny the beating, wounding, &c., or state facts and circumstances of resistance &c. to justify it.

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verify. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

G. H., Attorney for Defendant.

DEFENCE OF A HOUSE, ETC.^a

10. *Plea to a declaration for an assault and battery, that they were committed by Defendant, as servant of the occupier of a house, to expel Plaintiff, showing he resisted and assaulted the Defendant.^b*

Commencement as ante, p. 640, form 1.—The defendant saith that one J. E., before and at the said time, when, &c., was possessed of a certain dwell-

(a) In pleas of this kind care must be taken that the cause or ground of justification warrants or covers all the trespasses charged in the declaration, to which the plea is pleaded, 17 Ohio Rep. 456; and the defendant must, on a replication *de injuria*, prove all the facts laid in his plea, which are necessary to support the whole justification alleged. Therefore, where the declaration complained of an assault, putting the plaintiff out of a shop and imprisoning him in the custody of a police officer, and the plea was *molliter manus imposuit* to remove the plaintiff from the defendant's shop, and a justification of the imprisonment because the plaintiff had assaulted the defendant, and the assault on the defendant was not proved by him, it was held, that although without it the first part of the plea was sustainable, yet, being a material allegation to maintain the plea as to the imprisonment, it was necessary to prove it, on a replication *de injuria*, to entitle the defendant to a verdict; *Reece v. Taylor*, 4 N. & M. 470; 1 H. & W. 15, S. C.; see *Bone v. Daw*, 3 Ad. & E. 711. Trespass for assault and false imprisonment, &c.: Plea, that the defendant was possessed of a dwelling house, and that the plaintiff entered it, and insulted, abused and ill-treated the defendant and his servants, and greatly disturbed them in the possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance and depart from the house, which the plaintiff refused to do, and continued making the said disturbance and affray therein, that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested him to take the plaintiff into custody, which the policeman did. It appeared in evidence that the plaintiff entered the defend-

ant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman, that the plaintiff refusing on request to go out of the shop, the shopman endeavored to turn him out and an affray ensued between them, that the defendant came into the shop during the affray, which continued for a short time after he came in, that the defendant then requested the plaintiff to leave the shop quietly, but he refusing to do so the defendant gave him in charge to a policeman, who took him to a station house. Held, first, that the defendant was justified under the circumstances in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray. Held, secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself, or rather the affray in his presence, was not proved; *Timothy v. Simpson*, 1 C. M. & R. 757; 5 Tyr. 244; 6 C. & P. 499, S. C.

A plea which professes to justify several assaults and false imprisonments laid in separate counts, must show distinct occasions upon which the defendant was justified in committing each particular trespass. Therefore in *M'Curd v. Driscoll*, 1 C. & M. 618; 3 Tyr. 571, S. C., a plea was held bad on special demurrer, which was pleaded to several counts of the above description and after justifying under process, alleged that the plaintiff forcibly resisted the execution of the process, wherefore the defendants, in order to arrest the plaintiff and to overcome his resistance, committed the trespasses. Bayley, B. observed, "There are six assaults and four imprisonments laid in the declaration. The party justifying is bound to cover the whole. I see no reason which you give for assaulting him six times. You profess to justify four imprison-

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ling house, with the appurtenants, situate and being in the county aforesaid; and being so possessed thereof, the plaintiff, just before and at the said time, when, &c., to wit, on the day and year aforesaid, was unlawfully in possession of the said dwelling house, and with force and arms making a great noise and disturbance therein; and at the said time, when, &c., was therein making such noise and disturbance, without the leave or license and against the will of the said J. E., and whereupon the defendant, as the servant of the said J. E. and by his command, then requested^c the plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said dwelling house, which the plaintiff then wholly refused to do; whereupon the defendant, as the servant of the said J. E. and by his command, in the defence of the possession of the said dwelling house, *gently laid his hands*^d on the plaintiff, in order to remove, and did then remove him from the said dwelling house; [and because he, the plaintiff, then resisted the defendant in that behalf, and then assaulted the defendant, and used violent and menacing language and gestures towards the defendant, and would then and there have beat, bruised and ill-treated the defendant, if he had not defended himself against the plaintiff; he, the defendant, at the said time, when, &c., did defend himself against the

ments. You should have shown that circumstances existed by which you had a right to imprison him, whereupon you imprisoned him once; and then that such and such circumstances occurred whereby you had a right to imprison him again, wherefore you imprisoned him on the second occasion, and so throughout; but here you do not show any different occasions." On the other hand, it is sufficient to prove so much of a plea as substantially sustains the cause of justification, and covers the trespasses which the plea professes to answer. In *Atkinson v. Waru*, 1 C. M. & R. 827; 5 Tyr. 481; 3 Dowl. P. C. 483, S. C., to a declaration for assault and imprisonment, the plea justified the apprehension of the plaintiff on a charge of felony, alleging his *resistance*, wherefore defendant beat him, &c. The evidence supported the justification as to the arrest for felony; but the plaintiff's resistance was not proved. The Court held that the verdict was right, the defendant having proved as much of his plea as was necessary to cover the declaration, and it not being necessary for him to prove what was unnecessarily alleged. See 17 Ohio Rep. 456.

(b) *Peggott v. Kemp*, 1 C. & M. 197; 3 Tyr. 128. It was there held on special demurrer, that *de injuria* was a good replication to the above plea; see *Bardons v. Selby*, 1 C. & M. 500, *ante*, 770, note. But it would not be a good replication if the plaintiff showed *title* to, and not

mere possession of the house, &c.; *Vivian v. Jenkin*, 3 Ad. & E. 741. Where the plaintiff relies on *excessive violence* on defendant's part, as an answer to the justification, he should now assign or reply such excess; *ante*, 769.

(c) Where the entry is peaceable, there must be a request; *Tullay v. Reed*, 1 C. & P. 6.—Plea showing forcible entry, &c.; *Weaver v. Bush*, 8 T. R. 78.

(d) This justifies the battery. *Titley v. Foxall*, 2 Ken. 308; see note (a).

(e) The allegation between the brackets will of course be omitted, if not warranted or rendered necessary by the facts and statement of the declaration. A necessary degree of *beating* and *pushing* and *pulling* about may be justified under the *molliter manus imposuit*, but if there were an actual resistance, and in consequence thereof any *wounding*, or a greater degree of violence on the defendant's part than would otherwise have been justifiable, it is proper to state the facts accordingly. A *wounding* or the striking several blows, and several times knocking down; *Gregory v. Hill*, 8 T. R. 299; *Johnson v. Northwood*, 1 Moore, 420; 7 Taunt. 689, cannot be justified merely to expel a person, without showing resistance, &c. The expulsion may be justified, but not an *imprisonment*, unless there be a breach of the peace, &c.; *Green v. Bartram*, 4 C. & P. 308. See 17 Ohio Rep. 456.

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plaintiff, and in so doing, necessarily and unavoidably gave and struck the plaintiff divers blows and strokes, and did wound and ill-treat him, and knock, cast and throw him down to and upon the ground, and necessarily and unavoidably a little rend, tear and damage the clothes and wearing apparel of the plaintiff,] doing no unnecessary damage to the plaintiff on the occasion aforesaid; which are the supposed trespasses^b whereof the plaintiff hath above complained against the defendant. And this he is ready to verify, [&c., conclude as ante, p. 641, form 1.

11. *Plea that a burglary had been committed in Defendant's house, that Plaintiff was found in a suspicious manner near the house, wherefore Defendants, one being a constable, took him before a magistrate, who remanded him, &c.*

Commencement as ante, page 640, form 1.—The defendants say that, just before the said time, when, &c., in the said declaration mentioned, to

(a) Of course this must be varied according to the facts and the averments in the declaration.

(b) In *Hembro v. Bailey*, 1 C. & M. 204; 3 Tyr. 152, to a count for trespass and assault, the defendant pleaded a justification in defence of a dwelling-house "situate in the county aforesaid," with an averment "which are the same trespasses," &c., and concluded with a traverse *absque hoc*, "that he was guilty elsewhere than in the dwelling house." It was held that the *qua est eadem* was sufficient, and that the traverse was surplusage, and bad on special demurrer.

Bayley B., "Try it on principle: the allegation in the declaration is transitory as to time and place, the plaintiff might give in evidence of an assault at any time and place, then the defendant justifies an assault in a particular place, and adds that it is the same assault complained of in the declaration. Does he not thereby virtually exclude any other place; and then is not the traverse superfluous, and consequently bad on special demurrer?"

(c) There is a material distinction between arrests without warrant by *private individuals*, and arrests by *peace officers*, on suspicion of an offence. In order to justify the former in causing the imprisonment of a person *without a warrant*, he must not only make out a reasonable ground of suspicion, but must prove that a felony has been actually committed by some one; except in the case of an indictment found against

the party; whereas a *constable* having reasonable ground on a charge preferred by another person to suspect that a felony has been committed, is authorized to arrest the suspected party without warrant and take him before a magistrate or other proper authority, although *no felony* has been committed; *Beckwith v. Philby*, 6 B. & Cres. 637; 9 D. & R. S. C.; *Samuel v. Payne*, Doug. 359; *White v. Taylor*, 4 Esp. Rep. 80; *Cald. 291*; *Hobbs v. Branscomb*, 3 Camp. 420. If a constable without charge and of his own accord takes a person into custody on suspicion, he must, in general, like a private individual, prove that a crime was actually committed by some one; *Hobbs v. Branscomb*, 3 Camp. 420; The question what is reasonable ground for suspicion, is a mixed proposition of law and fact. Whether the circumstances alleged to show it reasonable or not, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a reasonable ground for suspicion, is a question of law; *Davis v. Russell*, 5 Bing. 354; 2 Moore and P. 590, S. C., and cases there cited.

A plea of justification by a private individual must state facts showing the ground of suspicion, (that the court may judge of its reasonableness.) In *Mure v. Kaye*, (4 Taunt. 34.) the plea justified an imprisonment only by stating that a forgery had been committed, and that afterwards the plaintiff was "suspiciously possessed" of the document, and did "in a suspicious man-

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wit, at —, in the county aforesaid, certain persons to the defendants unknown, with force and arms, &c., in the night time, to wit, about the hour of one of the clock in the morning of the — day of —, in the year aforesaid, burglariously and feloniously broke and entered a certain dwelling house of the defendant, W. D., with intent the goods and chattels of the said W. D. therein being feloniously and burglariously to steal, take, and carry away; and that the said persons, just before the said time, when, &c., having been disturbed and interrupted in breaking and entering the same, attempted to escape, and made their escape from the said house; whereupon they, the defendants, did then and there, immediately after the commission of the said felony, and whilst the said offenders were so attempting to escape, raise a hue-and-cry after, and go in quest of and search for and endeavor to find and take the said offenders; and they, the defendants, in making such search, did then and there, and immediately after the said offence was committed, find, perceive, and discover the

ner" dispose of the same to A. B., and then "in a suspicious manner" left England; wherefore defendant had reasonable cause to suspect, and did suspect plaintiff, &c., and this plea was held bad on (general) demurrer.

There is an important distinction between *felonies* and *misdeemeanors*, in reference to a constable's *power of arrest*. In the case of *treason and felony*, a constable may, by virtue of his office and without warrant, arrest a party upon a reasonable charge or suspicion of these offences, although in fact it eventually appear that *none was committed*, and the constable had *no view of*, or did not see any part of the transaction; Hale, P. C. 587; 1 East, P. C. 303; Burn, J. tit. Constable, iv. *Lewis v. Arnold*, 4 C. & P. 354. A constable *may* and is bound at his peril to arrest for felony upon a reasonable suspicion arising from facts within his own knowledge, or communicated to him by others; and upon a reasonable charge of felony, he is protected and justified in arresting, although before he can take the suspected person before a magistrate, he discovers that no offence has been in fact committed, and therefore discharges him without going before a justice; *Ledwich v. Catchpole*, Cald: 291; *White v. Taylor*, 4 Esp. 80; *Stonehouse v. Elliot*, 6 T. R. 315; *Rex v. Akenhead*, Holt, N. P. R. 473.

But in the case of *affrays*, *Cook v. Nethercote*, 6 C. & P. 723; and the authorities collected in *Timothy v. Simpson*, 1 C. M. & R. 760; and the breaches of the peace, &c., it appears that a constable has no power to arrest without warrant, if the affray did not take place in his presence, but were quite over when he

arrived, and there were no chance of its renewal, and is not justified in arresting in such case even upon a positive charge. For it is a constable's duty to preserve or prevent a breach of the peace, not to punish it, and his arresting after the affray has ended, cannot conduce to the former object. In a recent case it was decided that, if there be an affray, a person who witnesses it may, on the spot where it was committed, and while there is danger that it will be continued or renewed, deliver the affrayers in charge to a constable or police officer, and consequently that the latter may, although he did not witness the original affray, legally arrest the party so given in charge in such case; *Timothy v. Simpson*, *ubi supra*. And if an affray has happened, and a wound has been given which there is reasonable ground to suppose may end in felony, a constable may take the party who has given such wound, in custody; *Cowpey v. Henley*, 2 Esp. R. 540.

If A., having no right to apprehend B., direct a police officer to take B., and he do so, B. may maintain trespass, but if A. merely make a statement to the officer, leaving it to him to act or not, as he thinks proper, trespass does not lie against A.; *Hopkins v. Crowe*, 7 C. & P. 373.

It will not justify searching a man's house, that one has been arrested there having in his possession counterfeit paper. But existence on the premises of guilty implements, or evidence of crime, will warrant a search, but if not found there, the justification fails; 13 Ohio Rep. 508. Even in such case, circumstances of reasonable suspicion may be proved in mitigation.

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plaintiff, near to the said dwelling house of the said W. D., and in a certain lane, not being the main high road; close to the said house, the same then and there being an unseasonable hour, in that behalf, for persons to be abroad, to wit, between the hours of one and two of the clock in the morning of the day and year aforesaid; and the said lane being in the direction which it was probable the said offenders had taken in making their said escape, whereupon the defendants then and there interrogated the plaintiff, and inquired of him who he was and where he was going, and required him to give some account of himself, and to state what he was about, and thereupon the plaintiff then and there stated to the defendants, that, [*&c.*,] and the plaintiff did not nor would, in any other or more satisfactory manner, give an account of himself, and on being then and there further interrogated, by the defendants, respecting the said matters, hesitated and prevaricated, and contradicted himself in regard to the same, wherefore the defendants having good and probable cause of suspicion, and vehemently suspecting, by reason of the premises, that the plaintiff was guilty of or concerned in the said burglary and felony; and the defendant, W. P., then and there being a constable of the township of — aforesaid, they, the defendants, did then, to wit, at the said time, when, &c., gently lay their hands upon the plaintiff for the cause aforesaid, and did then and there take the plaintiff into their custody, in order to carry and convey him before a justice or justices of the peace, of and for the said county, to answer the premises, and to be there dealt with according to law; [and because it was dark, and the said offenders, so unknown to the defendants, were not far distant, and the plaintiff expressed his unwillingness to accompany the defendants, and there was reason to suppose, and the defendants then supposed, that the plaintiff might and would attempt to escape from their custody, or that the said offenders, so unknown to the defendants, would attempt to rescue the plaintiff from such custody of the defendants, they, the defendants, then and there, in order to prevent such escape and rescue, and as was reasonable and necessary for that purpose, put and affixed the said *handcuffs*,^a or manacles, upon the wrists of the plaintiff, and kept the same upon his wrists until the plaintiff was taken to the said cage or prison, as in the said declaration first mentioned;] and because it was then very early in the morning, and an unseasonable time for the defendants to carry the plaintiff before such justice as aforesaid, they, the defendants, for that reason and for the cause aforesaid, necessarily and unavoidably conveyed the plaintiff to, and imprisoned the plaintiff, and kept and detained him in the said prison, there called the cage, in the said declaration first mentioned, until a convenient and fit time of the day of the said — day of —, in the year aforesaid; and the defendants further say, that as soon as conveniently could be on the day and year last aforesaid, the said W. P., as and so being such constable as aforesaid, did, at the instance of the said W. D., carry and convey the plaintiff in his custody to the said police office, in the said declaration mentioned, before a certain person, to wit, M. W., Esq., then and

(a) See *Wright v. Court*, 4 B. & C. 596.

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there being one of the justices assigned to keep the peace of and for the county aforesaid, and also to hear and determine divers felonies and misdemeanors therein committed, to answer the premises and to be there dealt with according to law; and the defendants further say, that the said justice did, thereupon, order the plaintiff to be remanded until the then next following day, for examination, and that the said W. P. should then bring up the plaintiff for examination touching the premises; whereupon the said W. P., as and so being such constable aforesaid, at the instance of the said other defendants, did thereupon necessarily and unavoidably again imprison the plaintiff, and keep and detain him in prison until the then following day, to wit, the — day of —, in the year aforesaid, when the plaintiff was again carried and conveyed by the defendant, W. P., as and so being such constable, and by the said other defendant in his aid and assistance, and at his instance, before the said justice for further examination, according to the said order of him, the said justice, and again examined by the said justice touching and concerning the said premises; and thereupon the said justice then and there made his certain warrant, in writing, under his hand and seal, directed to the keeper of the jail of said county, and thereby required such keeper to receive into his custody the body of the plaintiff therewith sent him, brought before the said justice, and charged before him, upon the oath of the said W. D., on suspicion of having been concerned, with others, in burglariously breaking the dwelling house of the said W. D., against the peace, &c.; and by the said warrant the said justice then commanded the said keeper, safely to keep the plaintiff in his said custody, for re-examination on Monday then next, which said warrant the said justice then and there delivered to the said W. P., as and so being such constable; whereupon the plaintiff was then, under and by virtue of the said warrant, at the instance of the defendant, W. P.; and he, the said W. P., then and there being and acting as such constable as aforesaid, carried and conveyed, as in the said declaration mentioned, to the said jail, and there necessarily and unavoidably imprisoned and kept and detained in prison, according to the said warrant, until the Monday then next, to wit, the — day of —, in the year aforesaid, when he, the plaintiff, was, by the said W. P., as and so being such constable as aforesaid, and at the instance of the said other defendant, carried and conveyed before the said justice for re-examination, according to the said warrant; and the plaintiff was then again examined by and before the said justice touching and concerning the said premises, and the plaintiff was then, after a further investigation of the said matters, discharged out of custody by the said justice; and by means of the several premises, the plaintiff was imprisoned, and kept and detained in prison, for the said several spaces of time, and in the said manner in the said declaration mentioned, the same being just, reasonable and proper for that purpose, and lawful for the cause aforesaid, which are the said several supposed trespasses, whereof the plaintiff hath above thereof complained; and this the defendants are ready to verify. Wherefore, [*&c.*, concluding as ante, p. 641, form 1.

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Plea justifying Imprisonment and taking Goods, that some Indigo had been stolen from the Defendant, that on searching Plaintiff some Indigo was found on him, wherefore Defendant had Plaintiff taken before a Magistrate, &c.

Commencement as ante p. 640, form 1.] The defendant saith, that before the said time when, &c., to wit, on, [&c.,] in the county aforesaid, a large quantity, to wit, eleven ounces of indigo, the property of the defendant, was feloniously stolen, taken and carried away from the defendant by a person then unknown to the defendant, and that shortly afterwards, and before the said time when, &c., to wit, on, [&c.,] at, [&c.,] defendant had *reasonable and probable cause* to suspect and did suspect that the plaintiff did feloniously steal the said indigo, in this, to wit, that the plaintiff was then and there found lurking about in a suspicious manner near the house from which the said indigo was so stolen shortly after it was stolen, and also in this, to wit, that upon the plaintiff being then and there searched, a quantity, to wit, eleven ounces of indigo, resembling the defendant's said indigo, was then and there *found upon and in the possession of plaintiff*, which said last mentioned indigo defendant had then and there reasonable and probable cause to suspect and believe, and did then and there suspect and believe, to be the indigo of defendant, and which was stolen from him as aforesaid; whereupon for that cause afterwards, to wit, on, [&c.,] at, [&c.,] E. B., being then and there one of the constables of the township of G —, in said county in which the said felony was committed, at the request of the defendant, gently laid his hands on the plaintiff and took and arrested him on suspicion that he did feloniously steal the said indigo, the property of the defendant, and in order to carry him before a magistrate to answer that matter, and to be examined touching the same, and the defendant did then and there take into his hands and possession the said indigo so found upon and in the possession of the plaintiff as aforesaid, in order and with intent to produce and show the same to and before such magistrate upon the hearing of the said charge; and the said E. B. did then and there accordingly, at the request of the defendant, carry and convey the plaintiff to and before the said A. B. Esq. at — aforesaid, he, the said A. B., being then and there one of the justices of the peace of said county, duly commissioned and qualified, and assigned to keep the peace in and for the county aforesaid, and to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same, and the defendant did then and there produce and show the said last mentioned indigo before the said E. B., and delivered the same to him, and the said E. B. then and there took the same into his possession and custody for the purpose of the examination of the plaintiff touching the matters aforesaid, and the plaintiff was thereupon then and there, to wit, on, [&c.,] examined by and before the said A. B., touching and concerning the said felony, and the said last mentioned indigo was at the same time and place produced and shown to the plaintiff and also to the defendant; and the defendant then and there

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before the said A. B., charged the plaintiff with being suspected to be guilty of the said felony, and was then and there examined by the said A. B. touching the same and his reason for suspecting the plaintiff, and upon such examination so had and made, the said A. B. thereupon, to wit, on, [&c.,] at, [&c.,] dismissed the plaintiff out of custody upon the said charge; and the said indigo being the said goods and chattels in the said declaration mentioned, so taken and detained as aforesaid, was by order of the said A. B. then and there delivered and returned to the plaintiff, which are the supposed trespasses in the said declaration mentioned; and this the defendant is ready to verify, [&c., concluding as ante p. 641, form 1.

12. *To a declaration for an Assault, &c.—taking Plaintiff to a Police Station and before a Magistrate;—Plea under the City Charter that Plaintiff was found in Defendant's House under suspicious circumstances.**

Commencement as ante p. 640, form 1.] The defendant says, that before and at the same time when, &c. he was lawfully possessed of the said dwelling-house in the said declaration mentioned, the same being situate within the limits of the city of —, in said county of —, and the defendant being so possessed thereof, he, the defendant, was about at a late hour of the night of the day in the said declaration mentioned, and just before the said time when, &c. to lock up and secure the outer door of his said dwelling-house for the night, but the key of such door could not upon or after due and diligent search and inquiry be found, and there was reason to suppose that the said key had been improperly taken by some person or persons from the said outer door for some improper purpose, and in order to open the said door in the prosecution of a felonious or improper design or object, and there was reason to suspect, and the defendant just before and at the said time when, &c. did thereupon reasonably suspect that some person or persons had improperly and with felonious or evil design obtained admittance to, and then was concealed in the said house, whereupon the defendant then and just before the said time when, &c., sent for the said policeman or officer in the said declaration mentioned, and who belonged to the police force established under the said charter of said city, and was a policeman for the district wherein the said house was situate, and who was then and there on duty, [to wit, one —] and stated to him the circumstances and requested him to search, and the said policeman then thought it was necessary and proper to search the said dwelling-house for the purpose aforesaid, and thereupon the said policeman, having just cause to suspect, and

(a) This plea is founded on a charter which provided that policemen on duty might apprehend "all loose, idle and disorderly persons whom they shall find disturbing the peace, or whom they shall have just cause to suspect of any evil design, and all persons whom they shall find between sunset and the hour of eight in the forenoon lying in any highway, yard or other place, or loitering therein and not giving a satisfactory account of themselves," &c.

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then and there suspecting that some person was in the said house improperly and with such evil design, then entered and searched and examined the whole of the said dwelling-house, and upon such search and inquiry, the plaintiff was found in a private part of the said house, he not having any lawful or just or reasonable ground, excuse or cause for being in the said house, and it then being a late hour of the night and an unreasonable hour for his being in the said house, whereupon the defendant and the said police-officer requested the plaintiff to give a satisfactory account of himself, but he neglected and refused so to do, and by reason of the premises the defendant and the said police-officer had cause and reason to suspect, and did, before and at the same time when, &c., suspect that the plaintiff had improperly taken the said key and had unlawfully entered, and was in the said house, with an evil design; whereupon the said police-officer, and the defendant in the aid and assistance of the said police-officer, then and there gently laid their hands upon the plaintiff in order to take, and did then and there take him into the custody of the said police-officer, and did take and deliver him into the custody of a certain constable appointed under the said charter, who was in attendance at the nearest station-house, being the said police station-house in the said declaration mentioned, and the plaintiff was there kept and detained in custody for the cause aforesaid, until he afterwards and as soon as conveniently could be, was carried before the said justice of the peace in the said declaration mentioned, to wit, — Esq., being the mayor of said city, acting and having authority under the said charter, for examination concerning the premises, and to be dealt with according to law, and on that occasion the said acts in the said declaration mentioned, and therein supposed to be trespasses, were necessarily and lawfully committed by the defendant, and the plaintiff was necessarily and unavoidably imprisoned and kept and detained in prison for the said space of time in the said declaration mentioned, which are the same supposed trespasses whereof the plaintiff hath above thereof complained against the defendant; and this he is ready to verify; wherefore, [*&c., conclusion as ante p. 641, form 1.*]

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13. *Plea that Plaintiff came to the Defendant's house in the night and refused to leave, wherefore Defendant attempted to turn him out, and on his resistance, &c., caused him to be taken to a Police Station, and the next morning before a Magistrate.*

Commencement as ante, 640, form 1.]—The defendants say that before and at the said time when, &c., in the said declaration mentioned, the defendant, H. T., was lawfully possessed of a certain dwelling house and printing office situate in the town of — in the county aforesaid, and wherein he then and there carried on the business and employment of printing, publishing and selling a certain newspaper called the —, and the said H. T. being so

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possessed thereof, the plaintiff, together with a certain other person, to wit, one J. W. P., just before the said time, when, &c., to wit, on the day and year aforesaid, without leave or license of the said H. T., and at an unseasonable hour, to wit, at twelve o'clock at night, entered and came into the said dwelling house, and then and there with force and arms made a great noise and disturbance therein, and then and there insulted, abused and ill-treated the said H. T. and his servants and workmen in his said dwelling-house, and greatly disturbed and disquieted them in the quiet possession of the said dwelling house and in and about the carrying on therein the said business and employment, in *breach of the Peace* of the State of Ohio; whereupon the said H. T. then and there requested the plaintiff and the said J. W. P. to cease their said noise and disturbance and to depart from and out of the said dwelling house, which they the plaintiff and the said J. W. P. then and there wholly refused to do, and they then and there continued in the said dwelling house making the said noise and disturbance therein, and then threatened the said H. T. that they would continue making the said noise and disturbance in the said dwelling house, whereupon the said H. T. in his own right, and the said A. C. L. as the servant of the said H. T. and by his command, in order to preserve good order and tranquility in the said house at the said time when, &c., gently laid their hands on the plaintiff and on the said J. W. P. in the said dwelling house for the purpose of removing them therefrom, and did then and there force and compel the plaintiff to go down the said stairs, and drag him through and along the said passages into the said public street, and thereupon the plaintiff and the said J. W. P. at the said time when, &c., there violently and with a strong hand resisted the said endeavors of the defendants to turn them out of the said house, and still continued to make such noise, disturbance and affray in the said house, and threatened and forcibly and with a strong hand endeavored to remain therein making such noise and disturbance, and then and there unlawfully assaulted the defendants, and beat and ill-treated them; whereupon the defendants did then and there defend themselves against the plaintiff and the said J. W. P., and in so doing did pull and drag about the plaintiff, and give and strike him the said blows and strokes, and cast, push and throw the plaintiff down the said stairs, and tread, trample and jump upon him, and rend, tear, damage and destroy the said clothes and wearing apparel of the plaintiff; and thereupon the plaintiff and the said J. W. P. at and near the outer door of the said dwelling house, continued making their said noise, disturbance and breach of the peace, and then and there threatened the defendants that they would continue making their said noise and disturbance; whereupon the said H. T. in his own right and the said other defendant as his servant

(a) As to the proof of this, see *Timothy v. Ingle v. Bell*, *supra*; *Cohen v. Simpson*, 1 C. M. & R. 757; 5 Tyr. 244, S. C. *Huskisson*, *supra*. Effect of inability to prove ante, 174, note a; see further *Howell v. Jackson*, 6 C. & P. 738. Forms showing that plain-

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and by his command, in order to^a preserve the peace and restore good order and tranquility in and about the said house, and prevent the continuance and renewal of the said breach of the peace, then and there gave charge of the plaintiff to A. D. then and there being a police constable and peace officer of and for the district and place in which the said house was and is situate, and who then and there saw, and had view^b of the said breach of the peace so committed by the plaintiff as aforesaid, and then and there requested the said A. D. to take the plaintiff into his custody, and carry him before some justice or justices of said county, assigned to keep the peace in and for the said county of —, to answer the premises and to be dealt with according to law; and the said A. D. so being such *constable* as aforesaid, at such request of the defendants, then and there gently laid their hands on the plaintiff, and did then and there take the plaintiff into his said custody in order to carry and convey him before such justice as aforesaid, to be dealt with according to law for his said offence and breach of the peace; and because it was then late at night and an unreasonable time for the plaintiff to be carried before such justice or justices of the peace for the purpose aforesaid, the said A. D., so being such police constable and peace officer as aforesaid, for that reason and for the cause aforesaid, necessarily forced and compelled the plaintiff to go in and along the said public streets and places in the declaration mentioned to the said police station, and then and there imprisoned the plaintiff, and kept and detained him in prison there until the next morning and for the said space of time in the said declaration mentioned; and the defendants further say, that on the next morning, as soon as conveniently could be, the defendants forced and compelled the plaintiff to go in the custody of the said police constable and peace officer before T. H., Esq., one of the justices assigned to keep the peace in and for the said county of —, at the said police office, for examination concerning the premises, and to be dealt with according to law, and on that occasion the plaintiff was necessarily and unavoidably again imprisoned, and kept and detained in prison for the said space of time in the said declaration mentioned, doing as little injury and damage on the occasion aforesaid to the plaintiff, and his clothes and wearing apparel, as the defendants possibly could, which are the supposed trespasses in the said declaration mentioned, and whereof the plaintiff hath above complained against the defendants; and this they are ready to verify. Wherefore he prays judgment, if the said plaintiff ought to maintain his aforesaid action thereof against him, &c.

Other Forms of Justification of Assault, &c., to preserve the Peace.

In defence of third person; *id.*; Bone v. Daw, 30 Eng. C. L. Rep. 190.

(a) *De injuria* does not traverse the motive; (b) When this allegation is not necessary, see *Oakas v. Wood*, 2 M. & W. 791; see *ante*, 729, *Timothy v. Simpson*, *ubi supra*.
note.

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The like because plaintiff attempted forcibly to enter, and caused a riot near plaintiff's house ; *Ingle v. Bell*, 1 M. & W. 516 ; *Cohen v. Huskisson*, 2 M. & W. 477.]

14. *Plea (in Trespass for Imprisonment, &c. against a Sheriff) justifying under a writ of capias against a third Person whom Plaintiff fraudulently personated.*

Commencement as ante p. 640, form 1.] The defendant says that before either of the said times when, &c., to wit, on the — day of — A. D. — a certain writ of the State of Ohio, called a writ of capias, was issued out of the Court of Common Pleas of said county of —, directed to the sheriff of —, by which said writ the State of Ohio commanded the said sheriff that, [&c., set out the writ and the indorsement for bail and the delivery of writ to the sheriff, before the said times when, &c., or either of them,] and thereupon the said defendant H. C., then and there sheriff of said county, received said writ, and afterwards and before the return of the said writ, and before either the said times when, &c., in the said first count mentioned, to wit, on the day and year last aforesaid, in the county of — aforesaid, was in search of the said T. C., in order to arrest, and was endeavoring to take and arrest, and was about to arrest her upon and by virtue of the said writ, but the person of the said T. C. was unknown to him, the said, [&c.] all which premises the plaintiff then and there well knew, and that before and at the said time when, &c. the plaintiff, for the purpose of preventing the said, [&c.] from arresting the said T. C. upon and by virtue of the said writ, and of defeating the execution thereof, then and there, to wit, before and at the said times when, &c., in the said county of —, wrongfully, wilfully, knowingly, falsely, fraudulently, and deceitfully did personate the said T. C. to the said H. C., and assume to him the usual appearance and description of the said T. C. as the same had been represented to the said H. C., for the purpose of executing the said writ, as the plaintiff well knew, and then and there wrongfully, wilfully, knowingly, falsely, fraudulently and deceitfully, and for the purpose aforesaid, caused and induced and procured the said H. C. to believe and suppose, and he accordingly by such procurement did then and there believe and suppose that the plaintiff really was the said person T. C., mentioned in the said writ, and against whom the same was issued, and under such supposition and belief, and by reason of the said fraud and deceit of the plaintiff, did then and there as such sheriff, holding the said writ, and at the said time when, &c., take and arrest the plaintiff by her body, and take her to a proper place of confinement in the said county of —, and detain her in his custody under such supposition and belief and under color of the said writ, until the plaintiff discovered and declared to the said H. C. that she was not the said T. C.,

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whereupon the said H. C. immediately discharged the plaintiff out of his custody, and suffered and permitted her to go at large, and the said several supposed trespasses in the declaration mentioned were necessarily committed on that occasion, and not otherwise; and the plaintiff well knowing that the said H. C. acted under the said supposition and belief, did not at any time during the said several times in the said declaration mentioned, in any manner disclose to the defendant that she was not the said T. C.; and this the defendant is ready to verify, [&c.*]

Other Forms justifying under Civil Process..

Justification under a *capias* against the plaintiff; 3 Chit. Pl. 5th ed. 1083, 1087, 6th ed. 991, 994; *Reddell v. Pakeinan*, 3 Dowl. 714; 1 Gale, 104; 2 C. M. & R. 30, S. C.

A sheriff (*or his officer*) justifying under *mesne (not final)* process against plaintiff must show its return: Com. Dig. Pleader, 3 M. 24; *Cheasley v. Barnes* and others, 10 East, 82; *Shortland v. Govett*, 5 B. & C. 488; *Tidd*, 9th ed. 1033, note a.

Form of plea justifying under writ of *detainer*; and replication, no affidavit of debt and other pleadings, &c.; *Young v. Beck*, 1 C. M. & R. 448; 3 Dowl. P. C. 280.

Plea *molliter manus imposuit*, to serve plaintiff with a writ; replication, &c.; *Harrison v. Hodgson*, 21 Eng. C. L. Rep. 109.

Form of plea of justification under a *ca. sa.* against plaintiff; 3 Chit. Pl. 5th ed. 1088, 1089, 6th ed. 997, 998.

The like and replication *de injuria* to the residue, &c.; *Kerby v. Denby*, 1 M. & W. 336; *Whalley v. Williamson*, 7; 32 Eng. C. L. Rep. 512. *infra*, Form 15.

Justification under *ca. sa.* out of the Palace Court; 3 Chit. Pl. 1091, 1000.

By an attorney; *Oakley v. Davis*, 16 East, 82.

Justification under an *attachment* out of Q. B.; *Phillips v. Howgate*, 5 B. & Al. Al. 220.

15. *Replication de injuria, &c. to Plea of Justification under Process.*

Commencement as ante, p. 672, form 8.] That though true it is that the the said writ was issued and delivered to the said sheriff [and that the said warrant was granted and delivered to the said —] as in the said [second]

(a) The plaintiff admitting the writ and warrant, replied *de injuria* as to the residue. The 3 Camp. 108; *Morgan v. Bridges*, 1 B. & Ald. 647. There was also a plea of license in the defendants obtained a verdict. See *Selw. N. above case*.
P. tit. "Imprisonment" I.; *Price v. Harwood*,

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plea alleged, yet for replication to that plea the plaintiff saith, that the defendant at the said time when, &c. of his own wrong and without the *residue* of the cause in the said — plea alleged, committed the said trespasses in the declaration mentioned as the plaintiff hath above complained against him; and this the plaintiff prays may be inquired of by the country, &c.

16. *Plea of Justification under a Warrant of a Magistrate for an Assault.*

First plea, general issue, as ante, p. 767; second, after enumerating the trespass intended to be justified, if necessary so to do, actio non, as ante, 773] Because he says, that just before the said times when, &c. in the said declaration mentioned, to wit, on the said, [&c.,] at, [&c., *venue*,] the said plaintiff, with force and arms, [&c., *here state the cause for which the warrant was taken out, which, in the case in question, was as follows:*] made an assault upon the said defendant, and then and there beat and ill-treated the said defendant, in breach and violation of the peace of the State of Ohio, whereupon the said defendant afterwards, to wit, on, [&c.,] at, [&c.,] duly applied to C. Esq., he then and there being one of the justices of the said county assigned to keep the peace in and for said county of M., and then and there duly made oath, in writing, of the said last mentioned trespasses committed by the said plaintiff on the said defendant as last aforesaid; and thereupon the said C., so being such justice, as aforesaid, afterwards, to wit, on the day and year last aforesaid, at, [&c.,] duly made and issued a certain warrant, under his hand and seal, bearing date, to wit, the day and year last aforesaid, directed to any constable, and thereby commanded them, in the name of the State of Ohio, to take and bring before him, the said justice, or some other justice of the peace for the said county, the body of the said plaintiff, [&c., *setting forth the warrant*,] which said warrant, afterwards, and before the said time when, &c. in the said declaration mentioned, to wit, on, [&c.] the said justice duly caused to be delivered to one — who then and from thence, and until the said time when, &c. was a constable of the said township of —, and peace-officer in and for the said county of M., in due form of law to be executed, by virtue of which said warrant, he, the said — so being such constable and peace-officer as aforesaid, and the said defendant, in his aid and assistance, and by his command, afterwards, to wit, at the said time, when, &c., that is to say on, [&c.,] gently laid their hands on the said plaintiff in order to take, and did then and there take the said plaintiff into the custody of the said —, until the said defendant afterwards, and as soon as conveniently could be, was carried in the said county of M., to and before the said C., then being a justice of the peace as aforesaid, in and for the said county of M., for examination concerning the premises, and on that occasion the said plaintiff was necessarily and unavoidably imprisoned, and kept and detained in prison for the said space of time in

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the said declaration mentioned, and the said defendant committed the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained, which are the said several supposed trespasses in the said declaration mentioned, and whereof the said plaintiff hath above complained against him; without this, that the said defendant was guilty of the said supposed trespasses in the said declaration mentioned, or any, or either of them, elsewhere than in the said county of M., and in taking and carrying the said plaintiff in the said county of M., to and before the said C., as aforesaid, or at any time there, on the said — day of —, and in execution of the said warrant. And this, [*&c.*, conclude with a verification, as in next form.

17. *Plea of justification of imprisonment of Plaintiff, on suspicion of stealing.*

First plea, general issue, as ante, 767; second plea as follows:] And for a further plea in this behalf, [as to the assaulting, seizing, and laying hold of the said plaintiff, as in the first count of the said declaration mentioned, and pulling and dragging about her, the said plaintiff, and forcing and compelling her, the said plaintiff, to go from and out of a certain dwelling into the public street, and forcing and compelling her to go in and along the said streets to the said mansion house, in the said first count mentioned; and as to imprisoning the said plaintiff, and keeping and detaining her in prison for the said time, in the said first count also mentioned,] the said defendant saith, [*actio non, as ante, 773.*] Because he says, that before and at the time when, &c., to wit, on, [*&c.*] aforesaid, at, [*&c.*, venue,] aforesaid, [*here state the felony to have been committed, and the causes of suspicion against the plaintiff, and which, in the plea in question, was stated as follows:]* "The said plaintiff was the servant of the said defendant, and was then and there living and residing in the house of him, the said defendant; and the said plaintiff, so being such servant as aforesaid, to wit, at, [*&c.*] divers goods and chattels, to wit, 20 pair of silk stockings and 100 yards of lace, of great value, to wit, of the value of — dollars, the property of the said defendant, had been, and were feloniously stolen, taken, and carried away from and out of the possession of the said defendant;" and afterwards, to wit, on, [*&c.*] at, [*&c.*] divers, to wit, 20 bundles, containing the said goods and chattels, so feloniously taken and carried away as aforesaid, were found and discovered hidden and concealed in a certain cellar of and belonging to the house of the said defendant, and to which the servants of the said defendant had access; and the said bundles, containing the

(a) To justify an arrest by a private individual without warrant, on suspicion, it is absolutely necessary that a *felony* shall have been actually committed; 6 B. & C. 637; and so in the case of a constable, who, of his own head, takes a party into custody on suspicion; 3 Camp. 420.

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said goods and chattels, being so found and discovered as aforesaid, were immediately seized and taken away by the said plaintiff, the said plaintiff then and there averring that the same were the property of her, the said plaintiff, and the said plaintiff then and there endeavored to burn and make away with the said bundles, with their contents aforesaid, and did actually burn divers, to wit, 10 of the said bundles, so containing the said goods and chattels, the property of the said defendant as aforesaid ;" wherefore the said defendant, having good and probable cause of suspicion, and vehemently suspecting the said plaintiff to have been guilty of or concerned in the stealing and carrying away of the said goods and chattels of the said defendant, and to have feloniously taken and carried away the same, did, at the said time when, &c., gently lay hands on the said plaintiff, and did give the said plaintiff in charge to one W. S., then and there being a constable of — township and peace officer of said county, and then and there requested the said constable and peace officer to take the said plaintiff into his custody, and safely keep her until she could be carried and conveyed, and to carry and convey her before some one of the justices of the peace within and for the county aforesaid, to be examined by and before such justice, touching and concerning the premises, and to be further dealt with according to law ; and on that occasion the said W. S., so being such constable and peace officer as aforesaid, at the request of the said defendant, did then and there gently lay his hands upon the said plaintiff, take the said plaintiff into his custody, and as soon as conveniently could be, to wit, on the said — day of —, in the year aforesaid, the said plaintiff was carried and conveyed in custody to and before W. L., one of the justices of the peace within and for the said township of — in said county, to be examined by and before the said W. L., touching and concerning the premises, and to be further dealt with according to law ; and the said plaintiff was then and there detained,* by order of the said W. L., until and upon the — day of —, in the year aforesaid, when the said premises were examined by the said W. L., and the said plaintiff was afterwards discharged out of custody by the said W. L. ; and by means of the said several premises aforesaid, the said plaintiff was imprisoned, and kept and detained in prison, for the said several spaces of time in the said declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the cause aforesaid, which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against the said defendant, and this he is ready to verify ; wherefore he prays judgment if the said plaintiff ought to have or maintain her aforesaid action thereof against him, &c.

(a) This and the other averments must agree with the facts.

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18. *Plea — Correction of an Apprentice for Disobedience.^a*

First plea, general issue, as ante, 767; second plea, as to the assaulting, beating, and ill-treating the said A. B., actio non, &c. as ante, 773.] Because he says that before, and at the said time when, &c. in the said, [first count] mentioned, to wit, at, [*&c. venue,*] aforesaid, the said plaintiff was the apprentice of the said defendant, in his trade and business of a —, and then and there behaved and conducted himself saucily and contumaciously towards the said defendant, and then and there refused to obey his lawful commands relating to his duty as such apprentice as aforesaid, whereupon he, the said defendant, then and there moderately corrected him, the said plaintiff, for his said misbehaviour, which are the said assaulting, beating, and ill-treating the said plaintiff, in the said [first count] mentioned. And this, [*&c., conclude with a verification, as in preceding form.*

19. *Plea that the Plaintiff was unlawfully in the Defendant's dwelling house.^b*

First plea, general issue, as ante, p. 767; second plea, as follows:] And for a further plea in this behalf, [as to the assaulting, beating,^b and ill treating the said plaintiff, as in the said first count mentioned,] the said defendant, [*&c., actio non, as ante, p. 773,*] because he says, that the said defendant, before and at the said time when, [*&c.,*] was lawfully possessed^c of a certain dwelling house, with the appurtenances, situate and being at —; and being so possessed thereof, the said plaintiff, just before the said time when, [*&c.,*] to wit, on the same day and year in the said declaration mentioned, was unlawfully in the said dwelling house, and with force and arms making a great noise and disturbance therein, and at the said time when, [*&c.,*] staid and continued therein, making such noise and disturbance, without the leave or license, and against the will of the said defendant, and during all that time there greatly disturbed and disquieted the said defendant and his family in the peaceable and quiet possession and enjoyment of his said dwelling house; and thereupon the said defendant then and there requested the said plaintiff to cease

(a) As to this plea see Com. Dig. Pleader, 3 M. 19; 1 Bla. Com. 459; Burn, J. "Apprentice." See the forms Bro. Ent. 219. See the necessity of pleading this matter specially, 2 B. & P. 224.

(b) A wounding cannot be justified merely in defence of possession; 8 T. R. 299; Com. Dig. Pleader, 3 M. 10, 17; 1 Salk. 407; Lutw. 1483; though if the plaintiff attempted to enter the house with force, it is otherwise; see the law and precedent, 8 T. R. 78. If the plaintiff, up-

on the attempt to remove him, resisted, and was guilty of an assault upon the defendant or his family, and the defendant did actually beat or wound him in self-defence, those acts may be justified; 8 T. R. 299; stating at the †, in the above form, the assault by the plaintiff, and the defendant's self-defence, as in the form, ante, p. 775.

(c) This is sufficient; 3 Wils. 71, 73; 8 T. R. 78, 299.

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making his said noise and disturbance, and to go and depart from and out of the said dwelling house, which the said plaintiff then and there wholly refused to do, whereupon the said defendant, in defence of the possession of his said dwelling house, at the said time when, [*&c.*,] gently laid his hands upon the said plaintiff in order to remove, and did then and there remove the said plaintiff from and out of the said dwelling house, as he lawfully might for the cause aforesaid,† which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath complained against the said defendant; [*conclude with a verification, as ante, p. 789, form 17.*]

20. *Plea, Assault, &c., in defence of the possession of a Close, &c.**

First plea, general issue, as ante, p. 767; second plea, as follows:] And for a further plea in this behalf, [as to the said assaulting of the said plaintiff in the said first count mentioned, and beating and ill treating him as therein mentioned,‡] the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that he, the said defendant, before and at the said time when, [*&c.*,] was lawfully possessed of and in a certain close, to wit, a close called —, [or abutting, *&c.*, *setting out the abutments or boundaries,*] in the township of —, in the county aforesaid, [and of a certain gate of and belonging to the same close,] and being so possessed, the said plaintiff, a little before the said time when, [*&c.*,] with force and arms, and with a strong hand, and without the license or permission, and against the will of the said defendant, did force and break open, [the said gate,] and as much as in him, the said plaintiff, lay, did attempt and endeavor forcibly to break into and enter the said close of the said defendant, [and forcibly to drive into the said close a great number, to wit, — sheep of the said plaintiff,] and would then and there unlawfully and forcibly, with a strong hand, have effected and accomplished such unlawful attempt and endeavor, without the license or permission of the said defendant, and against his will, if the said defendant had not defended his said possession of his said close [and gate]; whereupon the said defendant, being then in his said close, and during the said forcible and wrongful attempt and endeavor of the said plaintiff, did, at the said time when, [*&c.*,] defend his, the said defendant's possession of his said close [and gate,] and oppose and resist the said attempt and endeavor of the said plaintiff, as it was lawful for him, the said defendant, to do on the occasion aforesaid and the said defendant further saith, that if any damage or injury then and there happened to the said plaintiff, the same happened of the wrong of the

(a) A forcible attempt to enter will justify a battery and wounding, 8 T. R. 78. tended to be justified, must depend on the statements in the declaration, and in many cases is

(b) This enumeration of the trespasses is wholly unnecessary.

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said plaintiff, and in the defence by the said defendant of his said close [and gate;] without this that he, the said defendant, was guilty of the said several trespasses in this plea mentioned, or any of them, at, [*&c.*, *venue*,] aforesaid, or elsewhere, or in any other manner than as in this plea mentioned; and this, [*&c.*; *conclude with a verification, as ante, p. 789, form 17.*]

 SEC. III. PLEAS, &c., IN TRESPASS TO PERSONALTY.

 21. *Plea of Property in the Defendant, &c.*

C. D. et al.	}	Common Pleas. In Trespass.
ads.		
A. B.		

And the said C. D., E. F. and G. H., come and defend, &c., and as to the force and arms, and the whole trespass aforesaid, except the taking and driving away one heifer of the said cattle, say that they are in no wise guilty; and of this they put themselves upon the country, and the said A. B. doth the like, &c.

And as to the taking and driving away the same heifer, the said C. D., E. F. and G. H. say, that the said A. B., his action aforesaid against them ought not to maintain, because they say, that long before the said trespass is supposed to have been done, the property of the same heifer was in the said C. D. and E. F., and they being possessed of the same heifer as of their own property, before the time when, [*&c.*,] delivered the same heifer into the possession of one T. S., at —, to be safely kept and pastured; and afterwards, and before the said time when, &c., the said A. B. took and drove away the same heifer from the possession of the said T. S., and afterwards at the said time when, &c., the said C. D. and E. F., in their own right, and the said E. F., as servant of the said C. D. and E. F., and by their order, took and drove away the said heifer, as they lawfully might do; and this they are ready to verify; wherefore they pray judgment if the said A. B. ought to maintain his action aforesaid against them, &c.

G. H., Attorney for Defendant.

 22. *Replication to plea of Property in the Defendant.*

A. B.	}	Common Pleas. In Trespass.
v.		
C. D.		

And the said A. B. says that, by reason of the matters in bar pleaded by the said C. D., E. F. and G. H., he, the said A. B., ought not to be barred from his action aforesaid, because he says, that the said C. D., E. F. and G. H., by force and arms, at, [*&c.*,] aforesaid, took and drove away the said

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heifer, as the said A. B. in his declaration has alleged, without this, that the property of the said heifer at the time of the said trespass, was in the said C. D. and E. F., as the said defendants have alleged; and of this the said A. B. puts himself upon the country; and the said C. D. [&c.,] do the like, &c.

E. F., Attorney for Plaintiff.

23. *Plea of removal of Goods, damage feasant, (in trespass de bonis asportatis.)*

First plea, general issue, as ante, p. 767, form 2; second plea as follows:] And for a further plea in this behalf, [as to the seizing, taking, removing and carrying away the said goods and chattels in the said declaration mentioned,] the said defendant says, that the said plaintiff ought not to maintain his aforesaid action thereof against him, because he says, that before, and at the said time when, &c., he, the said defendant, was lawfully possessed of a certain close, or piece or parcel of land, called —, [or if no name, describe it,] situate at, [&c.,] and because the said goods and chattels in the said last count mentioned, before and at the said time when, &c., in the said last count mentioned, were wrongfully in and upon the said close, or piece or parcel of land, encumbering the same, and doing damage there to the said defendant, he, the said defendant, at the said time when, &c., in the said last count mentioned, seized and took the said goods and chattels in the said last count mentioned, in the said close, piece or parcel of land, so encumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, to wit, in the town aforesaid, and there left the same for the use of the said plaintiff, doing no unnecessary damage to the said goods and chattels, on the occasion aforesaid; and as he lawfully might for the cause aforesaid; which are the same supposed trespasses, [&c.; concluding as in form 9, ante, p. 773.

24. *Justification of entry into the Plaintiff's house, and seizing his goods under a fi. fa. against him.*

First plea, general issue; second plea as follows:] And for a further plea in this behalf, as to the breaking and entering the said dwelling house in the said first count of the said declaration mentioned, and in which, &c., and making a noise and disturbance therein, and staying and continuing therein, making and continuing his said noise and disturbance in the said messuage or dwelling house of the said plaintiff, for the said space of time in that count mentioned, and there seizing and taking the said goods and chattels in the said first count of the said declaration mentioned, and converting and disposing of the same to his own use; and also as to the seizing and taking of the said goods and chattels, in the said last count of the said declaration mentioned, and

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converting and disposing thereof to his own use, above supposed to have been done by the said defendant, he, the said defendant, by leave, &c., says, &c., [as in No. 23, p. 793:] because he says that, before the said time, when, &c., in the said first count of the said declaration mentioned, to wit, on, [&c.] at, [&c.] one J. K., sued and prosecuted out of the clerk's office of the Court of Common Pleas of the county of — in said State, a certain writ, called, [&c., here state the issuing of the fieri facias, the indorsement, and the delivery thereof to the defendant as sheriff:] By virtue of which the said defendant, afterwards, and before the return of the said writ, to wit, at the said time, when, &c., peaceably and quietly entered into the said messuage or dwelling house in which, &c., (the outer door thereof being then and there open,) in order to seize and take, and did then and there seize and take in execution the said goods and chattels of the said plaintiff, in the introductory part of this plea mentioned, the same then and there being in the said messuage or dwelling house, for the purpose of levying the moneys so directed to be levied by the said indorsement on the said writ as aforesaid; and in so doing, the said defendant did then and there necessarily and unavoidably make a little noise and disturbance in the said messuage or dwelling house, and stay and continue therein making such noise and disturbance for the said space of time in the said first count of the said declaration mentioned; and afterwards, and before the return thereof, to wit, on the same day and year last aforesaid, at the town aforesaid, in the county aforesaid, sold the same goods and chattels; and by such sale thereof, and of certain other goods and chattels of the said plaintiff, made and levied the sum of two hundred and ninety dollars, towards satisfaction of the debt and damages aforesaid, as it was lawful for him to do for the cause aforesaid. And the said defendant afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at the town aforesaid, in the county of — aforesaid, paid to the said J. K. the sum of two hundred dollars, part of the said sum of money so made by sale of the said goods and chattels as aforesaid, in part satisfaction of the debt and damages aforesaid; and afterwards, and at the return of the said writ, to wit, on, &c., returned the said writ to the said court before, [at, &c., on, &c.,] and then and there returned thereon, that by virtue thereof, he had caused to be levied of the goods and chattels [or "goods and chattels, lands, tenements, real estate and chattels real,"] of the said plaintiff the said sum of — hundred dollars, part whereof, to wit, the sum of fifty-six dollars, he had retained for poundage and costs due on the said levy, and that — dollars, residue thereof, he had paid to the said J. K., in part satisfaction of the debt and damages therein mentioned; and that the said plaintiff had not any other or more goods and chattels, [or "any lands, tenements, real estate or chattels real,"] in the bailiwick of him the said defendant, whereof the said defendant could cause to be levied the residue of the said debt and damages, or any part thereof, which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against him, the said defendant; and this, [&c., conclude with a verification.

25. *Justification of killing a Dog.*

C. D. }
 ats. } ——— Com. Pleas.
 A. B. }

First plea, general issue to the whole; second plea as follows:] And for a further plea in this behalf, [as to the shooting off, firing off, and discharging the said gun, in the said first count of the said declaration mentioned, at, towards, and against the said dog, in that count also mentioned, and killing, striking, and wounding the said dog, above supposed to have been done by the said defendant,] he, the said defendant, [*actio non*, &c., as ante, p. 793, form 23.] because he says, that the said dog, in the said first count of the said declaration mentioned, [before the said time, when, &c., in that count mentioned, had been, and was used and accustomed to hurt and worry sheep, to wit, at, [&c., *venue*,] aforesaid. And the said defendant further saith, that the said dog, being so used and accustomed to hurt and worry sheep,] just before the said time, when, &c., to wit, on the day and year in the said first count mentioned, at the, [&c.] aforesaid, was hunting and worrying certain sheep of one E. F., of great value, [in a certain close of him, the said E. F., there situate,] for which reason, and because the said dog could not otherwise be restrained or hindered from hunting and worrying the said sheep, he, the said defendant, at the said time when, &c., as the servant of the said E. F., and by his command, shot off, fired off, and discharged the said gun, in the said first count of the said declaration mentioned, at, towards, and against the said dog, and then and there shot, hit, struck and wounded the said dog, as it was lawful for him to do for the cause aforesaid, which is the said supposed trespass in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against the said defendant; and this, [&c.] Wherefore, [&c.,] and, [&c.].—[*Third plea same as second, omitting the words within the brackets.*

SEC. IV. PLEAS, ETC., IN TRESPASS TO REALTY.

26. *Liberum tenementum.*

First plea, general issue; second plea as follows:] And for a further plea in this behalf, as to the breaking and entering the said close, in which, &c., in the said first count of the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming and spoiling the grass and herbage there then growing, and tearing up, forcing up, and removing the faggots in that count mentioned, and scraping up and collecting together the loose earth, soil, manure and compost in the said first count mentioned, and beating down,

(a) This enumeration of the trespasses intended in the declaration, and in many cases may be omitted to be justified, must depend on the statements wholly unnecessary.

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throwing down, prostrating and destroying part of the banks and mounds in that count also mentioned, and casting and throwing the said loose earth, soil, manure and compost, so scraped up and collected, and the earth and soil arising from the said banks and mounds, so prostrated and destroyed as in the same count mentioned, from and out of the said close; the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said close, in the said first count mentioned, and in which, &c., now is, and at the said several times, when, &c., was the close, soil and freehold of one J. K., to wit, at, [&c.] aforesaid; wherefore the said defendant, as the servant of the said J. K., and by his command, at the said times, when, &c., in the said first count of the said declaration mentioned, broke and entered the said close, in which, &c., in the said first count mentioned, and with his feet in walking, trod down, trampled upon, consumed, and spoiled the said grass and herbage therein also mentioned; and because the said faggots, earth, soil, manure and compost, in the said first count mentioned, and the said part of the said banks and mounds, in the said first count mentioned, before the said times, when, &c., had been wrongfully and injuriously put and placed, and were at those times remaining and being in and upon the said close, in which, &c., and incumbering the same, he, the said defendant, at the said times, when, &c., as such servant, and by such command as aforesaid, in order to remove the said incumbrances, tore up, forced up, and removed the said faggots, and scraped up and collected together the said loose earth, soil, manure and compost, and beat down, threw down, prostrated and destroyed the said part of the said banks and mounds, in the said first count mentioned, and cast and threw the said loose earth, soil, manure and compost, so scraped up and collected, and the said earth and soil arising from the said banks and mounds, so prostrated and destroyed, as in the same count mentioned, from and out of the said close, doing no unnecessary damage to the said plaintiff on the occasion aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against him, the said defendant; and this, [&c., conclude with a verification.

27. *New assignment setting out abutments.*

Commencement as ante, p. 772, form 8, and then as follows:] because he says, that the said piece or parcel of land in which, &c., in the said first count of the said declaration mentioned, at the said several times, when, &c., was and is a certain close in the town aforesaid, called — abutting, [&c., state the abutments;] which said close now is, and at the said several times, when, &c., was another and different close from the said close in the said last plea of the

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said defendant mentioned, and therein alleged to be the close, soil and freehold of the said defendant; and this he, the said plaintiff, is ready to verify: wherefore, inasmuch as the said defendant hath not answered the said trespasses, by him committed in the said close in which, &c., above newly assigned, the said plaintiff prays judgment, and his damages on occasion of the committing of the said trespasses above newly assigned, to be adjudged to him, &c.

28. *Plea to a new assignment—General issue and special plea.*

C. D. }
 ads. } ——— Com. Pleas.
 A. B. }

And the said defendant, as to the said several supposed trespasses above newly assigned, says that he is not guilty thereof, or of any part thereof, in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, &c.

And for a further plea in this behalf, as to the said several supposed trespasses above newly assigned, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that, [*&c., here state the subject matter of the plea—the conclusion, with a verification, is thus:*] And this he, the said defendant, is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, in respect of the said supposed trespasses above newly assigned, &c.

G. H., Defendant's Attorney.

29. *License.**

First plea, general issue; second plea as follows:] And for a further plea in this behalf, the said defendant says, [*&c., as ante 643, form 6,*] because he says, that he, the said defendant, at the said several times, when, &c., by the leave and license of the said plaintiff to him for that purpose first given and granted, to wit, at, [*&c.*] aforesaid, committed the said several supposed trespasses in the said declaration mentioned, as he lawfully might for the cause aforesaid; and this, [*&c., conclude with a verification.*]

(a) If one enter upon the land of another, by against the owner of the fee for destroying the virtue of a parol license given for a consideration paid, and erect a mill dam, trespass will lie dam; 15 Ohio Rep. 248.

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30. *Public way.*

First plea, general issue; second plea as follows:] And for a further plea in this behalf, as to the entering the said close of the said plaintiff, in the said first count in the said declaration mentioned, and in which, &c., and with feet in walking, and with the said cattle and carriages, in the said declaration mentioned, treading down, trampling upon, crushing, consuming and spoiling the grass and herbage then growing and being in the said close, and subverting, damaging and spoiling the soil of the said close, and digging up, pulling up, tearing up, prostrating and destroying the said stakes and posts, in the said first count mentioned, and with the said cattle, in the said declaration mentioned, eating up and depasturing the said other grass of the said plaintiff, there also growing and being, and also as to the breaking down, throwing down, prostrating and destroying the said banks, mounds and fences, in that count mentioned, and also as to digging up, pulling up, prostrating, damaging, and destroying the said gate-posts and other posts, in the said last count of the said declaration mentioned, and taking and carrying away the same, above supposed to have been done by the said defendant, he, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said posts, in the said first count mentioned, and the said posts in the said last count mentioned, were and are the same, and not other or different posts.* And the said defendant further saith, that before and at the said several times, when, &c., there was, and of right ought to have been, a certain common and public highway, into, through, over and along the said close, in which, &c., for all the good citizens of the State of Ohio to go, return, pass and repass on foot, and with cattle and carriages, at all times of the year, and at their free will and pleasure; wherefore the said defendant, being a good citizen of the said State of Ohio, and having occasion to use the same way, at the said several times, when, &c., went, passed and repassed on foot, and with the said cattle and carriages, into, through, over and along the said close, in which, &c., in, by, and along the said highway there, using the same as he lawfully might for the cause aforesaid.* And in so doing he, the said defendant, with his feet in walking, and with the said cattle and carriages, unavoidably a little trod down, trampled upon, consumed and spoiled the grass and herbage then growing and being in the said close, in which, &c., and subverted, damaged and spoiled the soil of the same close; and the said cattle, at the said several times, when, &c., in passing and repassing along the said way, by stealth and morsels, and against the will of the said defendant, eat up and depastured a little other of the grass there then growing in the said way.* And because the said stakes, banks, mounds, fences, gate-posts and other posts, in the said declaration mentioned, before the said several times, when, &c., had been wrongfully erected, and were then standing and being in and across the said

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highway, and obstructing the same, so that, without digging up, pulling up, tearing up, breaking down, throwing down, prostrating and destroying the said stakes, banks, mounds, fences, gate-posts and other posts, respectively, the said defendant could not then pass and repass with the said cattle and carriages, into, through, over and along the said close, in which, &c., in the said highway there, as he ought to have done: the said defendant, at the said several times, when, &c., in order to remove the said obstructions, dug up, pulled up, tore up, broke down, prostrated and destroyed the said stakes, mounds, fences, gate-posts and other posts, in the said declaration mentioned, and took and carried the said gate-posts, and other posts, to a small and convenient distance, and there left the same for the use of the said plaintiff, doing no unnecessary damage to the said plaintiff on those occasions, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against him, the said defendant; and this, [*&c., conclude with a verification.*]

31. *Private way.*

*First plea, general issue; second plea, same as the last form to the first *, and then proceed as follows:]* And the said defendant further saith, that he, the said defendant, long before, and at the said several times, when, &c., was and still is seised in his demesne as of fee, of and in a certain close, called —, contiguous and next adjoining to the said close, in which, &c., and that he, the said defendant, and all those whose estate he now hath, and at the said several times, when, &c., had of and in the said close, called —, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and the said defendant, at the said times, when, &c., of right ought to have had and used, and still of right ought to have and use, a certain way for himself and themselves, and his and their servants, farmers and tenants, occupiers of the said close, called —, to pass and repass, on foot and with horses, mares, geldings and other cattle, from a certain common and public highway, in the town of — aforesaid, into, through, over, and along the said close of the said plaintiff, called —, in which, &c., unto and into the said close, now of the said defendant, and so from thence back again, unto, into, through, and over and along the said close of the said plaintiff, called —, in which, &c., unto and into the said common and public highway, at all times of the year, at his and their free will and pleasure as to the said close of the said defendant, with the appurtenances belonging and appertaining. And the said defendant, being so seised of his said close, and also being in the possession thereof, and having occasion to use the said way, did, with his servants and horses, and mares, and geldings, and carriages, at the said several times, when, &c., pass and repass, in, by, through and along the said way, from the said common and

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public highway, into, through, over and along the said close of the said plaintiff, called —, in which, &c., unto and into the said close, now of the said defendant, and so from thence back again, in, by, through, and along the said way, unto and into the said common and public highway, using the said way there for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid, and in so doing, &c., [*as in last form, from the second * to the end; justifying the trespasses according to the facts, observing the introductory part of this plea.*]

Another form for like, under a non existing grant.

Plea of right of way by a non existing grant.

Commencement as ante, 798.]— Because he says, that at the said several times when, &c., he the said defendant was and still is seised in his demesne as in fee, of and in a certain messuage, and divers, to wit, 70 acres of land, with the appurtenances, situate and being in the township of, [&c.] aforesaid. And the said defendant further saith, that long before the said times when, &c. and at the time of the making the grant hereinafter mentioned, one J. P. was seised in his demesne as of fee, of and in the said closes in which, &c., and one P. H. was seised in his demesne as of fee, of and in the said messuage and land, with the appurtenances; and the said J. P. and P. H. being so respectively seised, heretofore, and long before the said several times when, &c., to wit, on, [&c.] at, [&c. venue] aforesaid, by a certain deed then and there made between him the said J. P. of the one part, and the said P. H. of the other part, which said deed hath since been lost and destroyed by accident, and therefore cannot be brought into court here, and the date whereof for that reason is wholly unknown to the said defendant, the said J. P. so being the owner of the said closes, in which, &c., did grant to the said P. H. so then being owner of the said messuage and land, with the appurtenances, and to his heirs and assigns, a certain way for himself and themselves, and his and their farmers and tenants, occupiers of the said messuage and land with the appurtenances, for the time being, and for his and their workmen, into, through, over, and across the said closes in which, &c., a certain way towards a certain common and public highway in the township aforesaid, in the county aforesaid, and so back again, into, through, over, and across the said closes in which, &c., in the said way there, towards the said messuage and lands, with the appurtenances, to go, return, pass, and repass, on foot and on horseback, and with their cattle, carts, and other carriages, every year, and at all times of the year, for the convenient and necessary use, occupation, and enjoyment of the said messuage and lands, with the appurtenances; by virtue of which said grant, he the said defendant, having the estate of the said P. H. of and in the said messuage and land, with the appurtenances, and being seised thereof in his demesne of fee, and so being in the occupation thereof, and having occasion to use the said way for the con-

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venient and necessary use, occupation, and enjoyment thereof, at the said several times when, &c., entered into the said closes, in the said declaration mentioned, and with horses, mares, geldings, and other cattle, and with carts, waggons, and other carriages, passed and repassed from the said messuage and land, with the appurtenances, into, through, and across the said closes, in which, &c., in the said way there, towards the said common and public highway, and back again in the said way into, through, and across the said closes, in which, &c., towards the said messuage and land, with the appurtenances, as it was lawful for him to do, for the causes aforesaid, and in so doing, [*&c., same as in form ante, 798, to the end, mutatis mutandis.*

32. *Plea of escape of Cattle by defect of Fences.*

First plea, general issue; second plea as follows:— And for a further plea in this behalf, as to the breaking and entering the said close in the said first count of the said declaration mentioned, and in which, &c., and with the feet in walking, treading down, trampling upon and spoiling the grass in the said close, and with the said cattle in the said first count mentioned, eating up, treading down, depasturing, consuming and spoiling, other the grass growing in the said close, and with the said cattle tearing up, eating off, pulling up, plucking off, consuming, spoiling, biting off, topping and destroying the spring wood and underwood in the said first count mentioned, and growing and being in the said close, and breaking down, throwing down and destroying the said hedge and fence in the said first count mentioned, growing, standing and being round and upon the said close, and as to the breaking and entering the said close in the said last count of the said declaration mentioned, and in which, &c., and with the said cattle in the said last count mentioned, treading down, depasturing, eating up, biting off, tearing off, topping, consuming, and destroying the spring wood and underwood in the said last count mentioned, growing and being in the said last mentioned close, above supposed to have been committed by the said defendant, he, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says that the said close in the said first count of the said declaration mentioned, and in which, &c., and the said close in the said last count of the said declaration mentioned, and in which, &c., now are, and at the said several times when, &c., were one and the same close, and not other or different closes. And the said defendant further saith, that he, the said defendant, before and at the said several times, when, &c., was lawfully possessed of a certain close called — with the appurtenances, situate, lying and being in the township aforesaid, in the county aforesaid, and contiguous and next adjoining to the said close of the said plaintiff, in which, &c.; and that the said plaintiff and all other the tenants and occupiers

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of the said close, in which, &c., for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have used and been accustomed to repair and amend, and of right ought to have repaired and amended, and the said plaintiff before and at the said several times, when, &c., of right ought to have repaired and amended, and still of right ought to repair and amend, the [hedge and] fence between the said close of the said defendant, and the said close, in which, &c., when and as often as occasion hath required, and shall or may require, to prevent cattle lawfully feeding and depasturing, or being in the said close of the said defendant, from erring or escaping thereout, through the defects and insufficiency of the said hedge and fence into the said close, in which, &c., and doing damage there. And the said defendant further saith, that the said hedge and fence before and at the said several times, when, &c., were ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary making, repairing and amending thereof. By means whereof, the said cattle in the said first and last counts of the said declaration mentioned, at the said several times, when, &c., then lawfully feeding and depasturing in the said close of the said defendant, without the knowledge of the said defendant, and against his will, erred and escaped thereout, into the said close, in which, &c., through the defects and insufficiency of the said hedge and fence, and eat up, trod down, depastured, consumed and spoiled a little of the grass there growing, and eat up, trod down, depastured, tore up, eat off, pulled up, plucked off, consumed, spoiled, bit off, topped and destroyed a little of the spring wood and underwood there also growing, in the said first and last counts respectively mentioned, and in passing through the said hedge and fence the said cattle, at the said time, when, &c., in the said first count mentioned, necessarily and unavoidably a little broke down, threw down and destroyed the same, being the said hedge and fence in the said first count mentioned. And on the occasions aforesaid, he, the said defendant, at the said several times, when, &c., as soon as he had notice of the said cattle having escaped into, and being in the said close, in which, &c., as aforesaid, entered into the said close, in which, &c., to drive, and did then and there drive the said cattle from and out of the said close, in which, &c., into the said close of him, the said defendant, and in so doing he, the said defendant, at the said several times, when, &c., did necessarily and unavoidably with his feet in walking, tread down, trample upon and spoil a little of the grass there also growing, doing no unnecessary damage to the said plaintiff on the occasions aforesaid, and as he lawfully might for the cause aforesaid; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against him, the said defendant. And this, &c., [*conclude with a verification.*]

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33. *Replication by way of special traverse, to form No. 30.*

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And the said plaintiff, as to the said plea of the said defendant, by him [secondly] above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, says that the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he says, that the said banks, mounds and fences, between the said closes of the said defendant, and the said close or piece or parcel of land of the said plaintiff, before and at the said several times when, &c., in the said plea of the said defendant, and in the said declaration above respectively mentioned, at, [&c.] aforesaid, were well and sufficiently maintained and repaired to prevent cattle feeding and being in the said close of the said defendant, from escaping from and out of the same into the said close of the said plaintiff, and that the said cattle of the said defendant in the said second plea mentioned, at the said several times when, &c., were wild, ungovernable and unruly, and used to break down banks, mounds and fences in good repair, and that the said cattle of the said defendant, at the said several times when, &c., at, [&c., *the venue*] aforesaid, through their said wild, ungovernable, and unruly disposition, broke down the said mounds, banks and fences, between the said close of him, the said plaintiff, and the said close of the said defendant, the same then being well and sufficiently maintained and in good repair, as aforesaid, and through the breach of the said banks, mounds and fences so made by the said cattle of the said defendant, as aforesaid, the said cattle, at the said several times when, &c., entered into the said close of the said plaintiff, and eat up the grass and herbage of the said plaintiff then growing there, and did damage there, in manner and form as the said defendant hath above, in his said [second] plea in that behalf alleged; without this, that the said cattle, so being in the said close or piece or parcel of land of the said plaintiff as aforesaid, a little before the said several times when, &c., in the said [second] plea mentioned, and against the will of the said defendant, and without his knowledge or consent, escaped from the said close, or piece or parcel of land of the said defendant, through the defects and insufficiency of the said banks, mounds and fences, between the said close of the said defendant and the said close, or piece or parcel of land of the said plaintiff, as the said defendant, hath above in his said second plea in that behalf alleged. And this he, the said plaintiff, is ready to verify. Wherefore he prays judgment and his damages by him sustained, by reason of the committing of the said trespasses, to be adjudged to him, &c.

E. F., Plaintiff's Attorney.

34. *Replication that the Defendant turned the Cattle into the locus in quo.*

Commencement as ante, form 33, p. 803, and then as follows:]—because he says, that just before the said time when, &c., the said cattle in the said declaration mentioned, were wrongfully turned and driven by the said defendant, from and out of the said highway, into and upon the said close, or piece or parcel of land, in which, &c., and upon that occasion, and by means and in consequence thereof, the said cattle were, at the said first time, when, &c., in the said close, in which, &c., depasturing on the grass there then growing, and doing damage there, in manner and form as the said plaintiff hath above thereof complained against him, the said defendant. And this, [*&c., conclude with a verification.*]

35. *Rejoinder that Cattle escaped by defect of Fences.*

As in form 9, p. 655, and then as follows:—because he says, that the said cattle of the said defendant escaped out of the said common or waste, in the said [second] plea in that behalf mentioned, into the said close in which, &c., called, &c., through the defect of the said fences, in the said [second] plea in that behalf mentioned, in manner and form as the said defendant hath above in his said [second] plea in that behalf alleged, and not through any breach of the said fence, occasioned as in the said replication to the said [second] plea mentioned. And of this he, the said defendant, puts himself upon the country.

36. *Plea justifying entering Plaintiff's close and taking away gelding, that Plaintiff had forcibly taken it away from the Defendant.**

First plea, not guilty, as ante, 767; second plea as follows:]—As to the breaking and entering the said close in which, &c., and treading down, and trampling upon the said grass, and taking, seizing, and leading away the said gelding, the said defendants say, [*actio non as ante, 792.*] Because they say that the said C. D. long before the said time when, &c., to wit, on [*&c.*] was possessed of the said gelding, as of his own proper gelding, to wit, at, [*&c.*] and the said C. D. being so possessed thereof, the said plaintiff did then and there, with force and arms, take the said gelding from the said C. D. and put him into the said close, and wrongfully detained him therein until the said time when, &c., wherefore the said C. D. in his own right, and the said E. F. as the servant of the said C. D., and by his command, at the said time when, &c., broke and entered the said close in which, &c., in order to retake the said gelding, and did retake the said gelding and carry him away, as he lawfully might for the cause aforesaid. And this, [*&c., conclude with a verification as ante, 792, form 21.*]

(a) As to a right of entry for this purpose, see 3 Bla. Com. 4.—Com. Dig. Pleader, 3 M. 39.—8 T. R. 78.—2 Roll. Rep. 55, 208.—2 Roll. Ab. 565.

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37. *Plea justifying Defendant's entering close, &c., because the highway is impassable.*

And for a further plea in this behalf, as to the breaking and entering the said close, &c., [*if necessary, enumerate the trespasses stated in the declaration and intended to be justified,*] the said defendant says, [*actio non, as ante, p. 801,*] because he says, that before and at the said time when, &c., and on the several other days and times in the said declaration mentioned, there was, and of right ought to have been, a certain common and public highway, running by and lying close to, and adjoining the said close of the said plaintiff, in which, &c., in the said first count mentioned, for all the citizens of the State of Ohio, to go, return, pass, and repass on foot and with horses, and other cattle, and with wagons, and other carriages, at all times of the year, at their free will and pleasure; and the said defendant further saith, that he, the said defendant, being a citizen of the State of Ohio, was desirous and had occasion and was about to go and pass, and did endeavor to go and pass in, through, over, and along the said common and public highway, with the said wagons and carts drawn by the said horses, in the said first count of the said declaration mentioned, but a great part, to wit, [ten yards] in length, and [ten yards] in breadth, of the said common or public highway, was then and there so miry, deep, foundrous, ruinous and in such bad state and condition, as to be wholly impassable by the said defendant with his said wagons and horses; and because the said close of the said plaintiff in which, &c., in the said first count mentioned, so lying contiguous and next adjoining the said common and public highway as aforesaid, was the most commodious and necessary way for him, the said defendant, to break out of the said highway so miry, foundrous, ruinous, and in such bad state and condition as aforesaid, to go and proceed towards B., in the county aforesaid, with the said wagons and with the said horses, he, the said defendant, at the said time when, &c., with the said wagons, and the said horses, did necessarily and unavoidably, and in order to proceed forward and towards B. aforesaid, a little break out of the said part, &c., of the said highway so miry, &c., as aforesaid, and enter and go, and pass over that part of the said close of the said plaintiff in which, &c., in the said first count mentioned, which lay close to and immediately adjoining the said common or public highway, so being in such state and condition as aforesaid, as it was lawful for him to do for the cause aforesaid, and in so doing he, the said defendant, with feet in walking, did a little break down, trample on, and consume and spoil, a little of the grass and corn then and there growing and being, and with the feet of the said horses, and also with the wheels of the said wagons did necessarily and unavoidably a little crush, damage, and spoil a little other the grass and corn of the said plaintiff then and there also growing and being, and with the feet of the said horses, and with the wheels of the said wagons, a little trampled, damaged, and spoiled the earth and soil of the said plaintiff in the said part of the said close so lying close

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to and immediately adjoining the said common or public highway as aforesaid, and did then and there necessarily and unavoidably a little cut down and destroy, prostrate and level, a little of the trees and underwoods, gates and fences, in the said last part of the said close there growing, erected and being, doing on those occasions no unnecessary damage to the said plaintiff, which were the same supposed trespasses in the introductory part of this plea mentioned, and whereof, &c., the said plaintiff hath above complained against him; and this, [*&c.*; *conclude with a verification, as ante, p. 789, form 17.*]

38. Plea (to Trespass for lopping, &c., Trees,) that they overhung, &c., the Defendant's grounds.

First plea, general issue; second plea, after enumerating trespasses, if necessary, pleading actio non, as ante, p. 801, form 32:] Because he says, that the said defendant, before and at the said time when, &c., and from thence hitherto hath been, and still is, lawfully possessed of and in a certain garden or parcel of land, situate and being in the township aforesaid, in the county aforesaid, and that the said branches in the said first count mentioned, and the said wood and underwood in the said last count mentioned, just before the said time when, &c., were overhanging, encumbering and damaging the said garden or parcel of land of the said defendant, and the vegetables therein growing; wherefore he, the said defendant, at the said time when, &c., did cut, lop and top the said branches and underwood so overhanging, encumbering, and damaging the said close of the said plaintiff as aforesaid, and took and carried away the said branches, wood, underwood, and berries, to a small and convenient distance, and there left the same for the said plaintiff, as he lawfully might for the cause aforesaid, which are the said supposed trespasses whereof the said plaintiff hath complained against the said defendant. And this, [*&c.*, *conclude with a verification, as ante, 789, form 17.*]

39. Plea in Trespass for entering a Colliery, &c., that the Defendant demised it to the Plaintiff, with a power of re-entry if the Rent were not paid, and justifying under such Power.

And for a further plea to the first count of the declaration, the defendant says, that before the said times when, &c., or either of them, to wit, on, [*&c.*,] at, [*&c.*,] by a certain instrument in writing then and there made between the defendant of the one part, and the plaintiff of the other part, the date whereof is the day and year last aforesaid, he, the defendant, demised to the plaintiff the said colliery and coal mine in which, &c., for the term of three years from the date of the said instrument in writing and demise, he, the plaintiff, paying therefor as rent, the sum or consideration of — cents per ton upon all coal

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which should be worked therefrom, [&c.,] and it was, and is, in and by the said instrument in writing and demise stipulated, provided and agreed upon by and between the said parties thereto, that such rents should be paid by the plaintiff to the defendant, in cash or good and approved trade bills, on or about the — day of every month, upon all coal worked from the said colliery during the previous month, and that the plaintiff should be bound to work or pay for 30 tons of coal per day at least, at the rate of — cents per ton aforesaid, and that in case of default in payment of such rents at the times in the said instrument and demise appointed for payment thereof as aforesaid, or within six days thereof, or in case of the breach of any of the agreements or stipulations contained in the said instrument and demise on the part of the plaintiff to be observed and performed, he, the defendant should have, and was to have, full liberty and authority to re-enter into possession of the said colliery, and to terminate and put an end to the said instrument in writing and the said demise, giving three days' previous notice in writing to him, the plaintiff, of such his the defendant's intention; and the defendant further saith, that afterwards, and after the making of the said instrument and demise, to wit, on, [&c.,] at, [&c.,] the plaintiff entered into and upon and became and was possessed of the aforesaid colliery, as tenant thereof, to the defendant upon the terms aforesaid, and continued to be such tenant until he, the defendant, entered into and upon the said colliery, and evicted the plaintiff therefrom in manner and form and for the causes hereinafter mentioned; and the defendant further saith, that afterwards, and after the making of the said instrument and demise, and whilst he, the plaintiff, was such tenant and so possessed of the said colliery as aforesaid, and long before the expiration of the term of years therein mentioned, to wit, on, [&c.,] at, [&c.,] being the 8th day of a month of the said term and tenancy in the said instrument in writing mentioned, a certain large sum of money, to wit, the said sum of — dollars, of the rent in the said instrument and demise mentioned, and thereby reserved and made payable to the defendant, being at and after the aforesaid rate of — cents per ton, upon 30 tons of coal per day, for and in respect of and during twenty-eight preceding days of the said term and tenancy, down to and inclusive of the last day of the next preceding month, that is to say, the month of — in the same year aforesaid, became and was due and payable in cash or good and approved trade bills, on or about the aforesaid — day of —, A. D. —, by and from the plaintiff to the defendant, according to the terms, tenor, and effect of the said instrument and demise, and in manner therein mentioned and provided for; and the defendant further saith, that although a reasonable time from and after the said — day of —, A. D. —, for the payment of the said arrears of rent in cash, or good and approved trade bills, and six days from the expiration of such reasonable time respectively elapsed long before the giving of the notice by the defendant next hereafter mentioned, and although before the giving of such notice, and after the expiration of such reasonable time from and after the said — day of

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— as aforesaid, to wit, on the — day of the said month of —, in the year aforesaid, at, [&c.,] he, the plaintiff, was requested by the defendant to pay and discharge the said arrears of rent in cash, or good and approved trade bills, yet the said arrears of rent at the time of giving the said notice herein-after mentioned, were and remained wholly due, in arrear and unpaid, and the same arrears or any part thereof had not then been paid in cash, or good and approved trade bills, or otherwise howsoever; and the defendant further saith, that thereupon, heretofore and after the expiration of the said six days from the aforesaid lapse of such reasonable time, from and after the said — day of —, in the year of our Lord —, for the payment as aforesaid of the said arrears of rent, and during the continuance of the said term and tenancy, and more than three days before and previous to the re-entry and eviction herein-after mentioned, to wit, on the — day of —, A. D. —, at said county, he, the defendant, gave to the plaintiff notice in writing of his, the defendant's intention and determination, after three days from the date and giving thereof, to re-enter into possession of the said colliery and coal mine, and to put an end to the said demise and instrument, holding him, the plaintiff, liable for the payment and fulfilment of all obligations due and accruing, and which should be due in respect of the same up to the — day of — aforesaid, being the third day from and after the date and giving of the said notice; and the defendant further saith, that the plaintiff did not at any time within three days from and after the giving of the said notice, or before the re-entry and eviction hereinafter mentioned, pay or discharge the said arrears of rent in cash, or good and approved trade bills, or otherwise howsoever; but the said arrears, and every part thereof, at the time of the said re-entry and eviction hereinafter mentioned, were wholly due, in arrear and unpaid, contrary to the aforesaid provisions of the said demise in that behalf, and thereupon, and more than three days from and after the giving of the said notice in writing to the plaintiff, and while the said arrears of rent remained and were wholly due and unpaid in cash, or good and approved trade bills, to wit, on the day and year in the said first count mentioned, he, the defendant, peaceably, quietly, and without resistance, re-entered into possession of the said colliery and coal mine, in pursuance of, and compliance with, the said notice in writing to that effect, and for the purpose of terminating and putting an end to the said instrument in writing and demise, which were then thereby determined, and then and from thenceforth, he, the defendant, retained possession of the said colliery and coal mine for his own use, and worked the same for his own use and benefit, as it was lawful for him to do, for the causes in this plea aforesaid, which are the same alleged trespasses in the said first count mentioned; and this the defendant is ready to verify; wherefore, [&c.; conclude as ante, p 789, form 17.

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40. *Rejoinder (to a Replication of Demise to the plaintiff,) notice to quit.*

*As on p. 697 to the *, and then as follows:]* Because he says thathe, the said defendant, after the making of the said demise, in the said plea in bar mentioned, and whilst the said plaintiff was possessed of the said place, in which, [&c.,] under and by virtue of the said demise, as tenant thereof to the said defendant; and half a year before the — day of —, in the year, [&c.] to wit, on, [&c.,] at, [&c.,] gave due notice to, and then and there required the said plaintiff to quit and deliver up the possession of the said demised premises, with the appurtenances, unto him, the said defendant, on the said — day of —, then next following; and by means thereof afterwards, and before the said time when, [&c.,] to wit, on the day and year last aforesaid, the said tenancy and the estate and interest of the said plaintiff in the said demised premises, and the said place in which, [&c.,] with the appurtenances, wholly ended and determined, to wit, at, [&c.,] aforesaid; and thereupon he, the said defendant, after the said tenancy was so ended and determined as aforesaid, to wit, at the said several times when, &c., entered into the said dwelling-house in which, &c., and committed the said supposed trespasses in the introductory part of the said second plea mentioned, as he lawfully might for the cause aforesaid, to wit, at, [&c.,] aforesaid. And this, [&c., conclude as ante, 645.

41. *Surrejoinder that notice to quit was waived.*

As in form 11, page 646, and then as follows:] Because he says, that after the giving of the said notice in the said rejoinder mentioned, and before the expiration of the said tenancy, to wit, on, [&c.,] at, [&c.,] aforesaid, the said defendant waived, relinquished and abandoned the said notice, and then and there assented, and agreed with the said plaintiff to the continuance of the said tenancy in the said replication mentioned; and the said tenancy did continue from thenceforth, until, and at and after the said time when, &c., to wit, at, [&c.,] aforesaid. And this he, the said plaintiff, is ready to verify; wherefore, as before, he prays judgment and his damages by him sustained, on occasion of the committing of the said trespasses, to be adjudged to him, &c.

E. F., Plaintiff's Attorney.

42. *Rebutter denying waiver of notice to quit.*

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And the said defendant, as to the said surrejoinder of the said plaintiff, to the said rejoinder of the said defendant to the said replication to the said [sec-

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ond] plea of the said defendant saith, that the said plaintiff ought not, by reason of any thing by him in that surrejoinder alleged, to have or maintain his aforesaid action against him, in respect of the said supposed trespasses in the introductory part of the said [second] plea mentioned, because he saith that the said defendant did not waive, relinquish or abandon the said notice, or assent, or agree with the said plaintiff to the continuance of the said tenancy in said replication mentioned, nor did the same continue in manner and form as the said plaintiff hath above, in his said surrejoinder, in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

G. H., Defendant's Attorney.

43. *Surrebutter (similiter.)*

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And the said plaintiff, as to the said surrebutter of the said defendant, and whereof he hath put himself upon the country, doth the like.

E. F., Plaintiff's Attorney.

CHAPTER XII.

REPLEVIN.

1. For what it may be brought.
 2. When demand necessary.
 3. Who may bring the action.
 4. Against whom.
 5. How brought, and form of the præcipe, affidavit and writ.
 6. Proceedings on the writ ; its execution and return ; with forms of appraisement, bond, and return.
 7. Pleas, &c., in Replevin.
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1. *For what it may be brought.*

This action is generally resorted to, in Ohio, to recover possession of a specific article, wrongfully detained from the owner. It is regulated by statute.^a

It does not lie for fixtures, attached to, and forming a part of the freehold ; but for goods and chattels, generally.

If the appraised value of the property does not amount to one hundred dollars or more, the plaintiff can recover no costs ; inasmuch as he should, when the property is worth less than one hundred dollars, bring his action before a justice of the peace.^b

2. *When demand necessary.*

The plaintiff must show that he was entitled to the possession of the property at the time the suit was commenced. It must also appear that the detention, by the defendant, was wrongful. In all cases in which the defendant's possession is lawful and proper, until the plaintiff demands the property, a demand must be made before the suit is brought. Thus, if property be found which was lost by the owner, no action could be maintained in Replevin, for the property, until after demand ; for, the possession of the finder is lawful and proper, until the owner makes known his claim. But an assumption and exercise of authority over the goods of another, inconsistent with the title of the

(a) Swan's Stat. 784.

(b) 44 vol. Stat. 41, § 2.

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owner, or in exclusion of his right, such as a wrongful taking in the first instance, will dispense with a demand.

So, where a sale and delivery of goods has been procured by fraud, the vendor, it seems, may maintain Replevin^a without demand.

And, in general, whenever Trover can be maintained without demand, Replevin may also be maintained without a previous demand.^b

No demand is necessary, in order to sustain an action against an officer, who levies on goods in possession of a judgment debtor.^c

3. *Who may bring the action.*

It is not necessary, in order to maintain this action, that the plaintiff should be the owner of the property; but, whether owner or not, he may sue in Replevin, if entitled to the immediate possession.

A person whose property has been taken in execution upon a judgment against him, or upon any mesne or final process against him, however informal the proceedings, cannot replevy the property.^d So, where a person's property is taken for the payment of any tax, fine or amercement, assessed against him, he can have no remedy therefor by an action of Replevin.^d

The action will not, in general, lie by one joint tenant, tenant in common or parcener, against his companion; for, if one joint owner, by a writ of Replevin, obtained exclusive possession as against his companion, he would violate the same right of possession of which he complained.

4. *Against whom.*

The suit must be brought against the person in possession of the property; and the plaintiff, under the plea of non detinet, must prove that the goods were in the possession of the defendant, as a part of his case.

5. *How brought; and form of the præcipe, affidavit and writ.*¹

The first step to be taken, in the prosecution of an action of Replevin, is, to make out and file in the clerk's office a præcipe, with an affidavit by the plaintiff, his agent or attorney, setting forth the matters contained in the form herein given.^d A writ of Replevin, issued without such affidavit, will be quashed at the costs of the clerk issuing the same, who, as well as the plaintiff, will also

(a) 1 Hill's N. Y. Rep. 311; see ante p. 20, 21, and the cases there cited; see 15 Ohio Rep. 200.

(b) See ante p. 20, 21; and the cases there cited.

(c) 13 Ohio Rep. 30.

(d) Swan's Stat. 787, § 12.

Form of Præcipe, Affidavit, and Writ.

be liable in damages to the party injured.^a But the defendant cannot object to a delivery of the property upon the writ, on the ground that no affidavit was filed.^b

The goods and chattels should be described with at least as much certainty as in trover.^c

If the sheriff is to be the defendant, the præcipe should request that the writ be directed to the coroner.

Præcipe and Affidavit.

A. B. }
v. } In Replevin. Damages — Dollars.^d
C. D. }

Issue a writ of Replevin for the following goods and chattels, to wit, [*here describe the articles.*]

T., Attorney for Plaintiff.

To the Clerk of — Common Pleas.

Dated, &c.

Affidavit.

The above named A. B. makes oath and says, that he has good right to the possession of the goods and chattels described in the above præcipe; that the same are wrongfully detained by the said C. D.; that the said goods and chattels were not taken in execution on any judgment against the said A. B., nor for the payment of any tax, fine or amercement, assessed against him, nor by virtue of any writ of replevin, or any other mesne or final process whatsoever, issued against the said A. B.

A. B.

Sworn to, &c.

The like, by an Agent or Attorney.

T. W., of, &c., makes oath and says, that he is the *agent* [or *attorney*] of the said A. B. in this behalf, and that, as he is informed and verily believes, the said A. B. has good right, &c., [*as above.*]

Writ of Replevin.

The State of Ohio.

To the Sheriff of — County, Greeting:

We command you, that without delay you cause to be replevied unto A. B., the goods and chattels following, to wit, [*here describe the property precisely as*

(a) Swan's Stat. 787, § 12.

(b) 10 Ohio Rep. 344.

(c) As to description in Trover, see ante, vol. 1, 585.

(d) A sum sufficient to cover the real damage.

Execution of Writ — Appraisement.

in the præcipe,] which C. D. wrongfully detains from the said A. B., as is said; and also that you summon the said C. D. to appear at the next term of our Court of Common Pleas, to be held within and for the said county of —, to answer unto the said A. B. for the unlawful detention of the goods and chattels aforesaid, damages — dollars, [*the amount stated in the præcipe,*] and have you then there this writ.

Witness, F. C., Clerk of our said Court at C., this — day of —,
A. D. —.

T. C., Clerk.

6. *Proceedings on the Writ — its Execution and return with Forms of Appraisement, Bond, and Return.*

The first step to be taken by the sheriff, is, to seize the property described in the writ. For this purpose, he may break open any house, stable, out-house, or other building, in which the property described in the writ is concealed, having first made demand of such property, and of entrance into such building, and the same being refused.^a

Upon seizure of the property, the sheriff must have it appraised by the oaths of two or more disinterested persons.^b

The sheriff will administer an oath to the appraisers as follows:

You do solemnly swear, in the presence of Almighty God, that you will truly assess the value of the property replevied by me in the case of A. B. v. C. D.

The appraisement may then be made out in the form following:

FORM OF APPRAISEMENT OF PROPERTY TAKEN UPON A WRIT OF REPLEVIN.

A. B. }
v. } Replevin. ——— Com. Pleas.
C. D. }

We, the undersigned, disinterested in the premises, being first duly sworn, do assess the true value of the following property, seized by the sheriff of — county upon a writ of replevin in the above case, as follows.

One horse at fifty dollars, [&c.]

[Dated]

[Signed]

E. F.

G. H.

Attest, S. S., Sheriff — county.

The officer will then give notice to the plaintiff, his agent or attorney, that a bond is required. This bond must be executed by the plaintiff, with two or more responsible freeholders of the county, as sureties.

(a) Swan's Stat. 785, sec. 3.

(b) Swan's Stat. 787, sec. 10.

The Bond — Return to the Writ.

If the appraised value of the property is less than fifty dollars, the bond must be at least for one hundred; and if the appraised value of the property is fifty dollars, or upwards, then the bond must be for at least double the appraised value of the property.^a The statute prescribes the condition of the bond,^a and the whole may be in the form following:

FORM OF REPLEVIN BOND.

Know all men by these presents, that we, A. B., E. F. and G. H., of — county, are held and bound to C. D., [*the name of the defendant,*] in the penal sum of [*here insert at least one hundred if the property is appraised at less than fifty dollars, and double the value, at least, if appraised at more than fifty dollars,*] for the payment of which we jointly and severally bind ourselves. Sealed with our seals, and dated this — day of —, A. D. —.

The condition of the above obligation is such, that whereas the said A. B., on the — day of — A. D. —, sued out of the Court of Common Pleas of — county, a writ of replevin against the said C. D., for the following goods and chattels, to wit: [*Here describe them and their value as in the appraisalment.*]

And which said writ is returnable at the next — term of said court:

NOW if the said A. B. shall appear at the said next term of said court, and prosecute his said suit to effect, and pay all costs and damages which shall be awarded against him, then this obligation shall be void, otherwise in full force.

[Signed] A. B. [SEAL.]
E. F. [SEAL.]
G. H. [SEAL.]

Perhaps the bond will be held good, although not signed by the plaintiff.^b

The officer, upon receiving the bond, will deliver the property to the plaintiff, and return the appraisalment and bond to the court with the writ.

If, however, the plaintiff, his agent or attorney, cannot give satisfactory security, or neglects to give bond, for the period of twenty-four hours from the time the property is taken in replevin, the officer must return the property to the defendant. The officer cannot take a bond after that time.^c

If the officer delivers property, replevied, to the plaintiff, his agent or attorney, or, detains the same from the defendant, without taking the bond of the plaintiff, his agent or attorney, (with two or more freehold sureties of the county,) within twenty-four hours from the period of taking such property, or, if the officer take insufficient security, he will be liable to the defendant in damages.^c

The return upon the writ of replevin may be as follows:

By virtue of this writ, December 27th, A. D. 18 — I replevied the within described goods and chattels, [*or if part only are replevied, say: I replevied the following goods and chattels, to wit: (describe them,) in the within writ*

(a) Swan's Stat. 787, §10.

(b) 10 Ohio Rep. 445.

(c) Swan's Stat. 785, §4.

Pleas, &c.

named ; the residue thereof not found,] I caused the value of the same to be ascertained by the oath of E. F. and G. H., (two disinterested persons, and after being duly sworn by me to truly assess the value thereof,) as per schedule herewith returned, and delivered said property to the plaintiff, he having given bond with R. S. and T. A., his sureties, two responsible freeholders, per bond herewith returned. I also summoned the defendant to appear at the return term of this writ, in pursuance of the command thereof.

S. S., Sheriff of — county.

7. Pleas, &c., in Replevin.

*Plea of non detinet.**

C. D. }
ads. } In Replevin.
A. B. }

And the said C. D. comes and defends, &c., and says that he does not wrongfully detain the goods and chattels in the declaration mentioned, or any part thereof, in manner and form as therein alleged ; and of this he puts himself upon the country, &c., and the said A. B. doth the like.

Property in another person.

C. D. }
ads. } In Replevin.
A. B. }

And the said C. D. comes and defends, &c., and says that the said A. B. ought not to have his aforesaid action against him, because he says that the said *goods and chattels*, in the said declaration mentioned, at the said time when, &c., were the property of the defendant, (or, of one E. F.) and not of the plaintiff, and this he is ready to verify ; wherefore he prays judgment if the said A. B. ought to have his aforesaid action thereof against him, &c.

Replication thereto.

And the said A. B., as to the plea of the said C. D., *secondly* above pleaded in bar, says that he ought not to be barred of his action aforesaid, because he says that the said goods and chattels, in the said declaration mentioned, at the said time when, &c., were the property of him, the said A. B., and not of the said C. D., (or, of the said E. F.,) as the said C. D. in his said plea hath alleged ; and of this he puts himself upon the country, &c., and the said C. D. doth the like.

(a) Under this plea the defendant may show that he holds the property in dispute by virtue of a levy on execution against a third person, made by himself as constable ; 10 Ohio Rep. 344.

The plea of non cepit presents an immaterial issue—Wright, 645—inasmuch as it is wholly immaterial whether the original taking were by right or by wrong, by fraud, bailment or other-

wise, any further than such original taking may go to show whether the *detainer* is wrongful or right ; 7 Ohio Rep. (Part 2d) 133.

One intrusted with personal property is not thereby estopped from contesting the right of ownership of the person who intrusted him with it, and need not first redeliver the property ; 14 Ohio Rep. 58.

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CHAPTER XIII.

EJECTMENT.

- SECTION I. FILING THE DECLARATION.**
- II. SERVICE OF THE DECLARATION.**
1. Its object.
 2. When to be served.
 3. By whom to be served.
 4. Upon whom to be served.
 5. How served.
 6. The affidavit of service, and forms.
- III. PROCEEDINGS WHEN THE LESSOR OF THE PLAINTIFF IS UNKNOWN, OR A NON-RESIDENT.**
- IV. JUDGMENT BY DEFAULT.**
- V. CONSOLIDATION OF ACTIONS.**
- VI. WHO MAY DEFEND.**
- VII. HOW A PERSON MAY BE LET IN TO DEFEND, AND FORM OF MOTION FOR THAT PURPOSE.**
- VIII. THE COMMON CONSENT RULE AND PLEA, AND FORM THEREOF.**
- IX. SPECIAL CONSENT RULE.**
- X. ORDER OF SURVEY, AND SURVEY THEREUNDER.**
- XI. THE TRIAL.**
1. What title will support the action.
 2. What can be set up by the defendant.

SEC. I. FILING THE DECLARATION.

In most of the circuits the declaration and copies are made out by the attorney of the real plaintiff, and copies served by some private person, or the sheriff, before the original declaration is filed in the clerk's office. But the declaration in such case must be filed and proper entries made, at the term to which the tenant is warned to appear, or the case is not in court; and, in general, after serving the copies, and ten days before the appearance term designated in the notice to the tenant, the service is indorsed on the original declaration, (and sworn to if not served by an officer of the court,) and the original, thus indorsed, is filed with the clerk, who then, for the first time, enters the case on the docket.

Service of the Declaration.

In other circuits, the original declaration is filed with the clerk, who enters the case on the docket, and makes out a certified copy of the declaration, and delivers the same to the sheriff. The sheriff makes out copies from the one certified by the clerk, and after serving the copies, indorses service upon, and returns the certified copy to the court in like manner as if the same were process.

SEC. II. SERVICE OF THE DECLARATION.

1. *Its object.*

The declaration, in ejectment, is a species of process to bring the party interested into court: its delivery to the person in possession, resembles the service of a writ, rather than the delivery of a declaration; and as it is the first and only warning which the person in possession receives of the proceedings of the claimant, the courts are careful that a proper delivery be made, and that the nature and contents of the declaration be explained at the time to the party to whom it is delivered.*

2. *When to be served.*

By the statute of Ohio,^b it is provided, that no plaintiff shall proceed, in ejectment, to recover any lands or tenements against a casual ejector, without ten days previous notice being given to the tenant in possession, if any there be.

This notice is considered as legally given by the service of the declaration in ejectment, with the common notice attached, ten days before the term to which it is returned.*

The doctrine of notice to quit, as applied in England, is not applicable in this state; and the only notice, in general, necessary, to enable a party to recover in ejectment, is the ten days notice mentioned in this section of the statute.^d

Where, however, suit is brought to recover possession, as against a tenant, whose term, by the provisions of the lease, is to expire upon previous notice, the notice required by the lease should be given, before bringing an action of ejectment.

Although the court will sometimes make that a good service, under particular circumstances, which otherwise would be imperfect, yet, where the service has been within the ten days which the declaration and notice designates for the appearance of the tenant, they will not allow it to be ante-dated,* but the cause will be continued to the next term.

(a) 4 Wash. C. C. Rep. 200; 12 Wend. 180;

(c) 2 Ohio Rep. 267.

(d) Id. Ib.

8 Wend. 430; Adams on Eject. 209.

(e) Rankin v. Brindley 1 N. & M. 1; 4 B.

(b) Swan's Stat. 682, § 70.

& Ad. 84.

3. *By whom to be served.*

Any competent and disinterested person, whether an officer of the law or not, may serve the declaration.

The difference between the sheriff or coroner serving the declaration and a private individual, is, that if served by the latter, he must make affidavit to the service; whereas, if served by an officer, he may make return of the service without verifying it by his oath.^a

4. *Upon whom to be served.*

In general, the service should be made personally, upon the person in possession, exercising acts of ownership; or, when the possession is divided among several, the service should be upon each separately. If, therefore the premises are leased to one or several persons who are in possession, the service should not be upon the landlord, but upon the tenants.

When personal service can be made upon the person named in the notice, it is immaterial whether at the time of the service, he be on the premises or elsewhere.^b

When the tenant in possession resides abroad, or has absconded, service may be effected on his agent, on the premises.^c

Where it appeared that the tenant had absconded, leaving the key of the door with a broker, and with directions to let the house, the court held that service of a copy of the declaration on the broker, and sticking up another copy on the door of the premises, was sufficient for judgment against the casual ejector.^d

If the person named in the notice is absent, either wilfully or from accident, the service should be made upon such member of his family as will be most likely to convey to the tenant, and correctly, the object and nature of the service. The mode of such service will be hereafter stated.

Where the premises had been let to one person, and he had under let to others, it was held to be necessary to serve all the under tenants.^e

Where A. and B. occupied the same house, B. being absent, it was held that a copy, served on A., in the presence of B.'s wife, was insufficient; that a copy should have been also served on B.'s wife.^f

(a) 3 Wash. C. C. Rep. 356.

(b) Stra. 1064.

(c) 4 B. & A. 653; Steph. N. P. 1426.

(d) Scott v. Roe, 8 Dowl. P. C. 254.

(e) 4 Barn. & Cress. 259.

(f) 3 Wash. C. C. Rep. 356; see 1 B. & P. 369.

Service of the Declaration.

5. *How served.*

In general, the mere delivery of a copy of the declaration is not a service of the declaration. There must also be an explanation of the object and meaning of the declaration and notice. This explanation may be made by reading the notice and by informing the person that the land in his possession is claimed by persons named in the declaration; that he must defend the suit in court; and if he neglects to attend to his defence, at the next term of the court, he will be turned out of possession.

It will be perceived that a declaration is not *SERVED* where the intent and meaning of the notice and declaration are not explained when a copy of the declaration is delivered; unless, indeed, the statements of the tenant show that he understands, without explanation, its intent and meaning.^a

It is not necessary that service should be on the land. It may be made there or elsewhere.^b

If a person named in the notice cannot be found on the premises, being absent, then all such steps should be taken, on the premises, as to be most likely to convey to the tenant a copy and information of the object of the declaration and notice.

But no very well defined rule upon this subject can be given, inasmuch as the court always exercises a discretion, and will determine whether the service was sufficient or not from the circumstances of each case; always, however, protecting a tenant when his default to appear arises from the want of notice of the pendency of the suit.

When the tenant is wilfully absent to prevent the service of the declaration, or endeavors to avoid the service, proof of this and service on his wife, or if his house be shut up, a declaration and notice nailed on the door, would be sufficient.

A tender of the declaration and reading the notice aloud, though the tenant refuse to receive it, or run away and shut the door before it is read, or threaten with a gun to shoot the person serving it, if he should come near; throwing the declaration in at the window, sticking it to the door, or leaving it at the house, upon the servants' refusing to call their master, have been held good service;^c for, in such case, it is apparent that the tenant knows the object and intent of the declaration and notice, which is all that the service could accomplish, however formally made.

If the tenant has absconded and left the premises in the care of another person, as his agent, service should be made on the agent.

The steps proper to be taken when the tenant is accidentally absent, will depend, in some degree, upon the situation of the premises, and the manner in which they are occupied. If the family of the tenant are on the premises, a copy should be left with his wife, with a request to give it to her husband, at the same time explaining to her the object and intent of the declaration and notice, and with a request that she will inform her husband.

(a) 1 Cow. 222.

(b) Stra. 1064.

(c) Adam's Eject. 214.

The Affidavit of Service, and Forms.

Service on a brother or daughter of the tenant in possession, will be insufficient, unless the tenant afterwards acknowledge its receipt,* or circumstances be proved to show that it came to the knowledge of the tenant.

In general, if the tenant is accidentally from home, and the service is made on his son or other member of his family than his wife, or by nailing the declaration and notice to the door, if the house is shut up and no one in it, or by any other means than personal service on the tenant, or his wife, the court will not hold it sufficient, unless they are satisfied from the facts stated, that the service came to the knowledge of the tenant ten days before the appearance term.^b Service on the wife, however, is generally deemed sufficient, without any additional circumstances, to show that it came to the hands of her husband; for, it is presumed that he is temporarily absent; but if it appear that the husband did not return, and was not informed of the service until within ten days before the appearance term, the plaintiff will not be entitled to judgment by default — at least until the next term.

6. *The Affidavit of Service and Forms.*

The affidavit must state the mode in which the declaration was served; and usually states that a copy of the declaration and notice were delivered to the tenant in possession or his wife, &c., and that the notice thereto annexed was read and explained at the time of the delivery; or, generally, that the tenant was informed of the intent and meaning of the service.^c

It is, in general, made by the person who served the declaration, though the court have been satisfied with the affidavit of a person who saw the declaration served upon, and heard it explained to, the tenant in possession.^d

The affidavit must state that copies of the declaration and notice were served.^e

If the sheriff serves the declaration, he may make the return in his official character, without oath.

Affidavit of Service.

John Doe ex dem. A. B. }
 v. }
 Richard Roe. }

C. D., of —, makes oath and says, that he, on —, did personally serve E. F., tenant in possession of the premises in the *within* declaration mentioned, or of part thereof, with a true copy of the *within* declaration and

(a) 2 Chit. Rep. 180; 6 Dowl. P. C. 71; 2 D. & R. 12; 1 Bowl. 692.

(b) 1 M. & W. 372; 1 Dowl. P. C. N. S. 414; 4 M. & Sc. 562; 1 Cowen, 222; Swan's Stat. 662, §70.

(c) Adams' Eject. 217.

(d) 2 B. & P. 120.

(e) 4 Bibb, 167.

Forms of Affidavits of Service.

notice, and at the same time acquainted the said E. F. with the intent and meaning of the said declaration and notice, and of the service thereof.

C. D.

Sworn to, [&c.]

The like — Service on the Wife.

— on —, did serve E. F., tenant in possession of the premises in the *within* declaration mentioned, or of part thereof, with a true copy of the *within* declaration and notice, by delivering the same to the wife of the said E. F. upon the premises aforesaid, [*or, at the dwelling house and place of residence of the said E. F., situate in —;*] and this deponent at the same time read over to the said wife of the said E. F., the said notice, and explained to her the intent and meaning of the said declaration and notice, and of the service thereof, the said E. F. being then temporarily absent.

The like — Service on any other of the Family.

Commence as in the last form,] by delivering the same to the son of the said E. F. upon the premises aforesaid, and this deponent at the same time read over to the said son of the said E. F., the said notice, and explained to him the intent and meaning of the said declaration and notice, and of the service thereof: And this deponent further saith, that afterwards, on —, this deponent saw the said E. F., and conversed with him upon the subject of this action, when the said E. F. told this deponent that he had received the copy of the declaration and notice last aforesaid on —.

The like — Service in another way.

Commence as before,] by delivering the same to a woman servant of the said E. F. upon the premises aforesaid, and this deponent at the same time read over to the said woman servant the said notice, and explained to her the intent and meaning of the said declaration and notice, and of the service thereof. And this deponent further saith that previously to such service of the said copy of the declaration and notice aforesaid, he, this deponent, called several times at the dwelling house of the said E. F. upon the premises aforesaid, for the purpose of serving him personally with a copy of the declaration and notice aforesaid, but the said E. F. was always at such times denied to this deponent; and this deponent hath made diligent search and inquiries for the said E. F. for the purpose aforesaid, but hath not been able to find him. And this deponent saith that he hath since heard, and verily believes, that the said E. F. [*keeps out of the way to avoid being personally served with a copy of the said declaration and notice, or, has absconded and gone to —, or, has gone to reside in —, or, as the case may be.*]

SEC. III. PROCEEDINGS WHEN THE LESSOR OF THE PLAINTIFF IS UNKNOWN, OR A NON-RESIDENT.

If the lessor of the plaintiff is unknown to the occupant of the land who is served with the declaration, the latter may require from the attorney of the former, an account of the place of abode or residence of the lessor of the plaintiff.^a If the attorney refuse to give it, or gives a fictitious account of a person who cannot be found; or, if the lessor of the plaintiff does not reside, or is not a freeholder within the county where the suit is brought, the court, on motion, before issue joined, will order security for costs to be given.^a

If the lessor of the plaintiff resides out of the state, or is an infant,^b or dead, the court will, on motion, before issue joined, stay proceedings until a real and substantial person, resident of the county, be named, or security be given for all costs.^a

SEC. IV. JUDGMENT BY DEFAULT.

The proper service of the declaration, ten days before the term to which the tenant had notice to appear, entitles the plaintiff to judgment by default at that term; unless the tenant, landlord, or other person, apply to be made defendant, and enter into the consent rule. If, at any time during the term, and after judgment by default, the tenant or other proper person apply to be made defendant, the judgment by default will be set aside, as a matter of course, and without costs. The form of judgments and verdicts in ejectment will be found in a subsequent part of this volume.^c

When judgment is taken by default against the casual ejector, no judgment is rendered against the tenant for costs.

SEC. V. CONSOLIDATION OF ACTIONS.

When several tenants are in possession, to whom the claimant delivers declarations for *different* premises, the court will not join them in one action, on the motion of either party, although the claimant has but one title to all the lands; for if the motion be made on the part of the plaintiff, the court will object, that each defendant must have a remedy for his costs, which he could not

(a) Swan's Stat. 664, sec. 72, 73.

(b) Since the first volume of this work was published, a statute has been passed (44 vol. Stat. 59, s. 5,) authorizing any next friend residing within or without this state, or any foreign guardian, to make such leases or demises on behalf of any minor children whose next friend

or guardian such person may be, in order to commence and maintain any action of ejectment on behalf of such minor children, as might or could be made by any guardian of such children who may reside within, and have been appointed according to the laws of the state.

(c) See post, Chap. 27.

Who may Defend.

have if all were joined in one declaration, and the plaintiff prevailed only against one of them; and if it be made on the part of defendants, that the lessor might have sued them at different times, and it would be obliging him to go on against all, when perhaps he might be ready against some of them only.^a But when several ejectments are brought for the *same premises*, upon the *same demise*, the court, on motion, will order them to be consolidated.^b Also when the premises are different, though the court will not consolidate the actions, yet where thirty-seven actions were brought against separate individuals, and all depending upon the same title, Lord *Kenyon* said that it was a scandalous proceeding on the part of the claimant, and ordered the proceedings in all the cases to be stayed, and abide the event of a verdict in one of them.^c When a number of causes are brought, and all depend upon the same title, and the questions to be litigated, and the evidence are the same in all, it is competent for either party to make an application to the court, that only one of the causes be tried; and that the plaintiff be not prejudiced by his omission to try others; and in a clear case, that they abide the event of the case to be tried. In passing upon such a motion, the court will be guided by the admission of the party against whom the motion should be made. If the affidavits of the party should agree that the points of inquiry and the evidence would be the same in all the causes, the motion would be granted. If they should disagree, though they should only leave the matter in doubt, the motion would be denied.^d

SEC. VI. WHO MAY DEFEND.

The court in application for that purpose, may, at any time during the term to which the tenant had notice to appear, make him, or the landlord, or any other person claiming title to the premises, defendant in the place of the casual ejector.^e

The court has no power to compel the tenant, or any one else, to make defence to or become a party to the suit.^f

The court exercises a discretionary power in the admission of persons who claim title, to be let in as party defendants.^g

If the landlord of the persons in possession, who were served with the declaration, exhibits a *prima facie* right, he will be admitted to defend.^h

The landlord will not be permitted to defend alone, until the tenant first neglect or refuse to appear, which should be stated in the affidavit for the motion; but, in general, the landlord and tenant will be both admitted as defendants.ⁱ

(a) *Adams Eject.*, 237; *Strange*, 1149.

(b) 7 T. R., 477; *Adams Eject.* 237.

(c) 2 Sell. Prac. 114; *Adams Eject.* 237.

(d) 4 Cowen, 78; 3 P. 5 Cowen, 232.

(e) *Swan's Stat.* 662, sec. 70.

(f) 4 Ohio Rep. 435.

(g) *Id.* Ib.

(h) *Id.* Ib.

(i) 1 Cowen, 134; 3 S. & R. 130.

How let in to defend — Journal entry.

The court will, in general, let in to defend, all such persons as may be entitled to claim under the occupying claimant law.

In general, a person claiming to be let in to defend, must show that his title is connected and consistent with the possession of the occupant;* and if his claim is in opposition to the title of the occupant, the court will not admit him to become a party defendant.^b

Where the plaintiff claims to recover no more than the interest of the tenant in the premises, subject to the rights of the landlord, or claims nothing inconsistent with the rights of the landlord, the landlord will not be let in to defend, for, he has no interest to defend.^c

SEC. VII. HOW A PERSON MAY BE LET IN TO DEFEND, AND FORM OF MOTION FOR THAT PURPOSE.

At any time during the term to which the tenant was notified to appear, the person or persons who desire to be made defendants, may apply to the court, by motion, for that purpose.

In general, the order making defendants to the suit, in the place of the casual ejector, is entered as a matter of course, if not objected to by the plaintiff. It is usually in the form following:

Form of Journal entry making parties Defendants.

John Doe ex dem. A. B.,
v.
Richard Roe. } In Ejectment.

On motion, [or, By consent of parties,] It is ordered, that C. D. [and E. F.] be made defendants herein, in the place of the now defendant, Richard Roe.

If the plaintiff objects to the party being made defendant, then a motion is entered in the form following:

Form of Motion to be made Defendant.

John Doe ex dem. A. B.,
v.
Richard Roe. } In Ejectment.

This day came C. D., by Mr. O. his attorney, and moved the court that he be made defendant herein, in the place of the now defendant, Richard Roe.

This motion is usually sustained by an affidavit or documentary proof, showing that the party making the application, has, or claims title connected and

(a) 1 Bibb. 128; 3 Bibb 266; 4 Bibb 88; 6 J. J. Marsh. 40; 1 Wend. 316.

(b) Steph. N. P. 1444.

(c) 1 Wend. 103.

Common Consent Rule and Plea.

consistent with the title of the occupant, upon whom the declaration was served; and if the motion is granted, it is entered thus:

[*Title of the case as above.*] The motion of C. D., to be made defendant herein, came on to be heard, upon affidavits filed; on consideration whereof, it is ordered that the said C. D. be made defendant herein, in the place of the now defendant, Richard Roe.

SEC. VIII. THE COMMON CONSENT RULE AND PLEA, AND FORM THEREOF.

The next step after the order making a person defendant, in the place of the casual ejector, is to enter into the Consent Rule.

The common consent rule, as entered into in England, has been somewhat modified by a rule of the Court in Bank, which requires the defendant, who is made a party in the place of the casual ejector, to not only confess the lease, entry and ouster, but admit that he is in possession of so much of the premises as he defends for, defining the extent and boundaries of his possession, and to plead not guilty. All this must be reduced to writing and signed by counsel; whereupon the issue is considered as made up, without any change in the declaration.*

When a suit is brought against several persons for an entire tract, they holding, severally, parcels of the land, it is advisable for each to defend for the several parts, specifying the particular part each claims;^b for, it will prevent confusion and embarrassment in case proceedings are had, under the occupying claimant law, for improvements, &c. They may, however, all unite in the consent rule and plea; in which case they cannot, it seems, have separate trials.^c And where several defendants hold distinct parcels, but join in a plea, they cannot afterwards object that there ought to have been several suits;^d nor need it be proved that they entered or held jointly.^e

No other plea is, in general, admissible than not guilty; and matter of defence, arising after issue joined, must be pleaded, *puis darrein continuance*.

Form of Common Consent Rule and Plea.

John Doe ex dem. A. B.,
v.
C. D., [*name of the real defendant.*]} ——— Com. Pleas. In Ejectment.

And the said C. D. comes and confesses lease, entry and ouster, and admits

(a) See the Rule, ante p. 8. Rule 17.

(b) Tidd, 1227; 7 Term Rep. 390; Runn. on Eject. 223.

(c) 1 Marsh. 107; 1 Harr. & Johns. 182; 4 Yeates, 272. Where the lessor of the plaintiff claims title to an entire tract, which is in pos-

session of persons claiming to hold, in severally, different portions of the tract, but one suit is generally brought; and this is proper.

(d) 1 Marsh. 151.

(e) 5 Ohio Rep. 452; 3 Cowen, 75.

Special Consent Rule — Order of Survey.

himself to be in possession of the following premises, with their appurtenances, parcel of the premises, &c., in the said declaration mentioned, to wit: [*Here describe the extent and boundaries of so much of the premises as he defends for.*]

And the said C. D., for plea, says that he is not guilty of the trespass and ejectment, in the said declaration alleged; and of this he puts himself upon the country. And the said John Doe doth the like.

S. T., Attorney for Defendant.

SEC. IX. SPECIAL CONSENT RULE.

This occurs where one joint tenant, tenant in common or parcener, sues another. Such a suit cannot, in general, be maintained, unless there has been an actual ouster. If, in such case, the defendant were compelled to admit ouster, it would deprive him of his proper defence to the action. The court therefore, upon application for that purpose, and affidavit showing the circumstances, will permit the co-tenant of the plaintiff to enter into a special consent rule.^a If, however, it appears that the plaintiff has been actually obstructed in his occupation, the court will refuse the application.^b

The special consent rule admits the lease entry and possession, and also "the ouster of the nominal plaintiff, if an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise."^c

SEC. X. ORDER OF SURVEY, AND SURVEY THEREUNDER.

In general, when there is any difficulty about identifying the lines or boundaries of the land in controversy, or the question in controversy arises from a dispute about lines or monuments, an order of survey is made.

In general, the order of survey names a "day if fair, and if not fair, the next fair day thereafter." If no certain day be named in the order, reasonable notice of the time of making the survey is to be given to the adverse party.^d

Form of Order of Survey.

The Lessee of A. B. }
v. } In Ejectment.
C. D. }

By consent of parties, [*or, On motion of the plaintiff or defendant,*] it is

(a) 6 Cowen 391; Adams on Eject. 236; Barr. 1895; 18 Johns. Rep. 398; 4 Cowen, 16; 2 Cowen 585.

(b) Id. Ib.

(c) 2 Taunt. 397; Steph. N. P. 1447.

(d) Swan's Stat. 893, sec. 6.

ordered that the surveyor of this county, do go upon the lands in controversy, on the — day of — next, if fair, if not, then the next fair day thereafter, and [survey and lay off the same as either party shall require, *or say* survey the *first* and *second* and the *fifth* line in the following described premises, to wit: (*describing the premises*), and such other of said lines as either party shall require,] and return four fair plats and reports thereof to the next term of this court, together with the testimony of such witnesses as may be brought before him by either of the parties, touching the lines and corners in controversy.

The general powers and duties of the county surveyor, under the above order, are pointed out by statute.^a He may call upon the sheriff to prevent any resistance, &c., and may administer oaths to witnesses and take their testimony on the ground, touching corners, lines, &c.^a

SEC. XI. THE TRIAL.

1. *What Title will support the Action.*

The plaintiff must show that he had title, that is, a right to the possession—a legal estate, at the time of the demise laid in the declaration, and at the time of the commencement of the suit.^b

The title must be a legal title recognized by law, and not a mere equitable title which a court of chancery would by decree transform into a legal title.

In general the plaintiff must show title either :

- I. By regular chain of mesne conveyances duly attested and acknowledged from the patentee of the United States down to the lessor of the plaintiff; or
- II. By descent or devise; or
- III. By estoppel or title in the nature of estoppel; or
- IV. By prior possession.

It would not, of course, come within the design of this work to treat at length of these several modes of establishing title; but it may be useful to give a very cursory view of them for the purpose of showing how actions of ejectment are conducted and what preparations should be made for a trial.

1. When the plaintiff relies upon a regular chain of title from the patentee, he must procure the patent or a copy from the Recorder's office; and if it is not there recorded, he must address a letter to the Commissioner of the Land Office of the United States, requesting a copy of the patent, (naming therein the patentee, a description of the land, the district, or general designation of the body of land of which it is a part, such as Virginia Military, Congress, Refugee or United States Military, &c., and if possible the date, &c., of the patent,) and also enclose an affidavit stating the reasons why a copy is required.

(a) Swan's Stat. 893 to 895.

(b) 2 Dana, 68.

The Trial — Evidence of Plaintiff.

If the original deeds, intermediate between the patentee and the lessor of the plaintiff are offered in evidence, their execution must be proved by the attesting witnesses if alive and within the jurisdiction of the Court; or, if dead, or without the jurisdiction of the Court, then their hand writing or the hand writing of the grantors, must, in general, be proved; otherwise the deeds will not be received in evidence. Certified copies of the deeds from the Recorder's office will, however, be received, without proof of the originals, and hence such copies are generally procured and given in evidence.

If any of the deeds are defective, that is, if not attested or acknowledged, as required by law, the plaintiff will fail in establishing a paper title.

2. Title by descent or devise. In the absence of all proof to the contrary it is presumed on proof of the decease of person that he died intestate. The mode of establishing title by descent—the proof of marriages births and deaths—is, generally, by the testimony of witnesses who knew the ancestor, his wife, and his children; when he died; the number and names of the children; and if any died, whether they left any children, &c.

The possession of the ancestor at the time of his decease, or his receipt of rents, is in general *prima facie* evidence of a seisin in fee.^a

Until a will is admitted to probate it cannot be received as evidence of title in ejectment.^b If the plaintiff proves the seisin, or receipt of rents by, and death of the deviser, and produces an authenticated copy of the will and probate, this will also be *prima facie* evidence of seisin in fee in the devisor.^b

3. Title by Estoppel, or in the nature of estoppel. This is a very common mode of establishing title.

In a suit by a mortgagee, against a mortgagor; by a vendor against his vendee; by a landlord against his tenant; by a purchaser on an execution against the judgment debtor, the plaintiff in general, rests his title upon proof of the relation which he stands to the defendant. In the first case the mortgage and notes are produced or a certified copy of the mortgage; in the second, the contract of sale; in the third, the lease, or proof of the existence of the relation of landlord and tenant, as the payment of rent; and in the fourth, the execution, levy, confirmation of the sale and the deed of the sheriff.

So, when the plaintiff shows that he and the defendant claim from the same common source of title, the plaintiff need not in general show a paper title beyond that common source.^c

So, when the plaintiff can trace title by duly executed *mesne* conveyances from the defendant to himself, (the defendant's deed being with warranty,) the plaintiff may rest.^c

(a) Bull. N. P. 102, 103; Adams, 254.

(d) 6 Ohio Rep. 87, 409; 8 Ohio Rep. 87;

(b) Bull. N. P. 103; 2 Phil. Ev. 282; 5

14 Pet. 84.

Tamst. 326.

(e) 5 Ohio Rep. 194; 7 Ohio Rep. (part 1)

(c) 1 Wend. 418; 7 Cowen, 637, 717; Litt. 227; 11 Ohio Rep. 475.

Sol. Ca. 444.

(f) 8 Ohio Rep. 5, 289.

It will also be found that many cases are covered by the principle, that parties and privies are estopped by their deeds.^a

4. Title by prior possession. It is a general rule that the plaintiff must recover upon the strength of his own title, and not upon the weakness of the defendant's.^b

It is, therefore, only in very peculiar cases that a plaintiff can, without showing any other title or fact than prior possession, recover against the defendant. Yet there are numerous cases where the plaintiff has recovered upon proof of prior possession under a claim of right, with evidence that the defendant's entry was wrongful.^c

Twenty years adverse possession is, however, a good title to maintain ejectment upon.^d

2. *What can be set up by the Defendant.*

The defence in general consists of proof,

I. Of an outstanding paramount title, or

II. Adverse possession.

1. An outstanding title.

A mere equitable title, either in the defendant or a third person, will not defeat the action. But if the defendant shows that some third person has a valid, legal title, paramount to that of the plaintiff, it will be a good defence to the action, although the defendant does not, by proof, connect himself with the title; for, it will be presumed, that the defendant is in possession under the title so shown, by sufferance or otherwise. But if the defendant's entry and possession were wrongful, then, it seems, he cannot protect himself by showing such outstanding title, unless he connect himself with it.^e

(a) See *id. ib.*; 5 Ohio Rep. 452, 485, 509. The purchaser at a sheriff's sale is privy to the debtor's title, and is therefore equally estopped with him. 3 Caines, 188; 10 Johns. 223. When the relation of landlord and tenant is once established by express act of the parties, it attaches to all who may succeed to the possession, through or under the tenant, whether immediately or remotely; the succeeding tenant being as much affected by the acts and admissions of his predecessor, in regard to the title, as if they were his own. 3 Taunt. 278; 5 Cowen, 123; 7 *id.* 323, 637; 3 Johns. 499; 4 S. & R. 467; 7 T. R. 488. But the tenant is not precluded from showing that an agreement to purchase or a lease was

made under a mistake while he was in possession, or unfairly obtained by misrepresentation or fraud; or that the title of the vendor or landlord had expired, or had been alienated by judgment, or operation of law. 2 Johns. Cases 223, 353; 1 Rawle, 408; 14 S. & R. 382; 6 Binn. 45; 14 Johns. 224; 7 Cowen, 717; 3 Bing. 474; 1 *id.* 360; 2 Stark. Rep. 230; 5 Cowen 122, 135; 5 Conn. 291.

(b) 7 Ohio Rep. (part 1,) 88.

(c) 8 Ohio Rep. 240, 388; 7 Ohio Rep. (part 1,) 146, (part 2,) 135.

(d) 8 Marsh. 30.

(e) 5 Litt. 318; see 1 Blackf. 136; Wright, 153.

A subsequent deed cannot be set up against a prior unrecorded deed, to show an outstanding title, unless the defendant claims under it.^a

A deed from the plaintiff to a third person, made after suit brought, will not be admitted in evidence to defeat the plaintiff.^b

2. Adverse possession.

To make out title in the defendant by adverse possession, it is necessary that the possession of the defendant and those under whom he claims, should, for the period provided by the several statutes of limitations,^c be continued, exclusive, open, notorious and adverse, but need not be under color of title.^d If, at the commencement of the period when the adverse possession began to operate as a bar under the statutes, the plaintiff or those under whom he derives title, labored under any of the disabilities mentioned in the statutes for the limitation of the action of ejectment, such disabilities will of course save the rights of the plaintiff while those disabilities existed.

Possession before patent issued, is not adverse.^e

In general, the possession of the defendant will extend to the limits of the deed (however defective) under which he claims the right of possession and title; but if he have no deed, it will extend only to that part of the premises of which he has possession by defined boundaries, such as a fence or actual clearing and cultivation, &c.^f

(a) 7 Monroe, 267.

(b) 2 Ohio Rep. 304.

(c) Swan's Stat. 554; 44 vol. Stat. 78; 47 vol. Stat. 54.
249, 262.

(d) 8 Ohio Rep. 159, 40; 11 Ohio Rep. 455.

(e) 6 Ohio Rep. 366; 7 Ohio Rep. (Part 1.)

(f) 8 Ohio Rep. 159.

CHAPTER XIV.

PROCEEDINGS ON DEMURRERS.

SECTION I. PROCEEDINGS BY THE PARTIES AND THE COURT UPON ISSUES AT LAW.

II. THE JOURNAL ENTRIES AND FORMS OF JUDGMENTS, ETC., WHEN THERE IS A DEMURRER ONLY, OR THERE ARE ISSUES OF FACT ALSO AND ISSUES OF LAW.

1. When the Defendant's demurrer to a declaration is overruled and leave to plead.
2. When the Defendant's demurrer to one or more counts of the declaration is sustained, and trial on the other issues, and judgment for the Plaintiff.
3. When the Plaintiff's demurrer to a plea in abatement is sustained—Judgment for the Plaintiff, that the Defendant answer over.
4. When the Defendant's demurrer to a replication to a plea in abatement is overruled—Judgment for the Plaintiff, that the Defendant answer over.
5. When the Defendant's demurrer to a declaration or replication is overruled, and damages assessed by a jury—Judgment for the Plaintiff.
6. The like damages assessed by the court in assumpsit, covenant, trespass or case.
7. The like in debt, on a penal bond.
8. The like in debt, on a single bill, record, promissory note, or simple contract, &c.
9. When the Plaintiff's demurrer to a plea or rejoinder is sustained—Judgment for the Plaintiff.
10. When the Defendant's demurrer to one count of the declaration is overruled, and damages assessed thereon, and trial, verdict and judgment on the issues in fact—assumpsit—Verdict and judgment for the Plaintiff.
11. When the Plaintiff's demurrer to a plea in abatement is overruled—Judgment for the Defendant.
12. When Plaintiff's demurrer to a plea is overruled—Judgment for the Defendant.

By the Court and Parties.

13. When the Defendant's demurrer to the declaration is sustained—Judgment for the Defendant.
14. When the Defendant's demurrer to a replication is sustained—Judgment for the Defendant.

SEC. I. PROCEEDINGS BY THE PARTIES AND THE COURT ON ISSUES AT LAW.

No demurrer book is made up, as in the English practice; nor is any notice given of the time and place of bringing on the demurrer for argument.

The demurrer must be disposed of before the issues in fact are tried.^a

The party demurring opens the argument upon the demurrer, the opposite counsel follow, and the opening counsel are entitled to reply.

On demurrer, the court consider the whole record and give judgment against the party who committed the *first error in substance*, in pleading.^b Thus, on demurrer to the replication, if the plea and replication both be bad, they will give judgment, not for the defendant, but for the plaintiff;^c provided the declaration be good; but if the declaration also be bad in substance, then judgment will be given for the defendant.^d But where the court look back of the pleading demurred to, and find an error of mere form, which could not be reached by a general demurrer, they will not notice such first error in pleading; for, the first error must be one of substance.^e And where the defendant pleads the general issue and also a special plea, to which the plaintiff replies, and the defendant demurs to the replication, and the court decide the replication to be good, the defendant cannot attack the declaration; for, although the plaintiff may object to the plea, if bad in substance, the defendant cannot overleap the general issue and object to the declaration: this would be, in effect, allowing the defendant to both plead and demur to the same count.^f If, however, in such case, the declaration be so defective that a verdict will not cure it, the defendant, on demurrer to a special plea, may attack the declaration, notwithstanding the general issue was pleaded with the special plea.^g

None of these rules are applicable to the case of a demurrer to a plea in abatement; for if, in such case, the plea is held bad, the defendant is not allowed to attack the declaration.^h

On one general demurrer to the whole declaration, if some counts are good and some bad, the demurrer will be overruled.ⁱ And so, where a single demurrer is put in to two pleas, if one of the pleas be good, the demurrer will be overruled.^j In such case, therefore, separate demurrers are usually filed.

A demurrer admits only what is well pleaded.^k

(a) Swan's Stat. 67, § 97.

(b) 7 Ohio Rep. [Part I] 229.

(c) 2 Wils. 150.

(d) 5 Co. 29, a; 14 Wend. 183.

(e) 8 Wend. 129.

(f) 11 Wend. 654; 14 Wend. 183.

(g) 16 Wend. 10.

(h) Steph. Pl. 144; 19 Wend. 216.

(i) 5 Ohio Rep. 514; 15 Ohio Rep. 333.

(j) 6 Ohio Rep. 336. (k) 14 Ohio Rep. 91.

By the Court and Parties.

If the demurrer is to the declaration and appear to be well taken, and the action is misconceived, or the defect in the declaration is such, from the nature of the facts and law, that it cannot be remedied by amendment, the suit should be discontinued by the plaintiff.

If, however, the defect can be remedied, and the decision of the court be in favor of the demurrer, leave will generally be given to the opposite party to amend the pleading, on payment of costs.*

So, on the other hand, if the demurrer is overruled, and was filed in good faith, and the court are satisfied that the party demurring has merits, they will permit him to plead, reply, &c. But if the demurrer be frivolous, or filed for delay merely, the court will, in general, give final judgment.†

The time allowed for pleading or replying, or for amendment, and the terms upon which it is granted, depend, in general, upon the discretion of the court, the nature of the case, and the state of the pleadings. The party in fault is, in general, required to pay the costs arising from the fault.

Formerly, when the demurrer was overruled, and the party demurring desired to plead, or reply to pleading demurred to, the court, instead of entering upon the journal and record a judgment overruling the demurrer, &c., permitted him to withdraw the demurrer, and plead or reply, upon payment of costs. Where a party thus withdrew his demurrer and plead, no opinion of the court upon the demurrer was entered in the record, and he could not, on writ of error, revise the opinion of the court upon the demurrer, having withdrawn it.‡

But now, by statute,§ it is provided, that in all cases pending in the Court of Common Pleas, or in the superior courts, in which a demurrer is overruled, and the case proceeds to the jury, and verdict is rendered against the party that demurred, the opinion of the court on such demurrer may be examined, and the final judgment reversed or affirmed, by the Supreme Court, on a writ of error.

If the court are equally divided in opinion, the pleading demurred to is held good.§

If the issue in law which has been determined go to the whole cause of action, there will be no occasion to proceed to trial upon the issue of fact; and the plaintiff may discontinue or enter a nolle prosequi as to the issue in fact, and proceed to have his damages ascertained upon the judgment on the demurrer, unless the opposite party plead over, by leave of the court.

Judgments upon demurrer are either final or interlocutory.

The simplest form of the journal entry and judgment record occurs, where there is but a single issue, arising either immediately upon the declaration, or upon some matter pleaded in bar of the action, and where the opinion of the court upon the demurrer is from the nature of the declaration or plea, final. In this case, judgment is entered upon the opinion of the court. See Form *infra*, Nos. 5, 6, 7, 8.

(a) See 1 Blackf. 301.

(b) 14 Ohio Rep. 204.

(c) 43 vol. Stat. 86, sec. 4.

(d) 5 Wend. 371.

(e) Swan's Stat. 687, §142.

There may, however, occur circumstances in the case which require corresponding variations in the journal entries.. Thus, issues of different kinds decided in different ways, or even where there is a single issue, it may have arisen on some matter in abatement, not going to the merits of the case. The journal entry of the proceedings and judgment must therefore vary according to the stage of the pleadings, the nature and effect of the decision, and being either for the plaintiff or defendant.

As to final judgments in demurrer on a single issue: If the opinion of the court on the demurrer is in favor of the plaintiff, and no leave is taken to plead over, the damages are assessed by the court or jury, and judgment entered thereon; See the Form *infra*, No. 9.

If the judgment on the demurrer be for the defendant, and no amendment asked, a judgment is entered that he go hence without day. See the Form *infra*, No. 12.

As to judgment when there are issues in fact as well as in law: In such case, the issue in law is first tried, and if that issue is decided in favor of the plaintiff, he may proceed to try the issue in fact; or if the issue in law be a decision of the whole cause of action, he may enter a *nolle prosequi* as to the issue in fact, and take damages on his judgment. But if the plaintiff, after obtaining a decision in his favor on the demurrer, desires to proceed also on the issues in fact, he should suspend proceedings on the demurrer, so far as respects an assessment of damages and judgment for the damages, and bring on the issue for trial in the ordinary manner. On the trial of the issue in fact, if the former judgment upon the demurrer were interlocutory, the jury, besides finding a verdict on the issue in fact, must also assess the plaintiff's damages on the demurrer; and the same course is pursued in actions on bonds when breaches are assigned.* When, therefore, in such case, there are issues in law and in fact, tried, and the issue in law is decided in favor of the plaintiff, and he proceeds to the trial of the issue in fact, the following entries are made in the journal and record: First, the opinion of the court and judgment on the demurrer; then an order as well to try the issue in fact, as to assess the damages on the issue in law; then the trial and verdict; and lastly, the judgment. See the Form *infra*, No. 10.

SEC. II. THE JOURNAL ENTRIES, AND FORMS OF JUDGMENTS, &c., WHEN THERE IS A DEMURRER ONLY, AND WHEN THERE ARE ALSO ISSUES OF FACT AND LAW.

1. *When the Demurrer to a Declaration is overruled, and leave to plead.*

A. B. }
v. } In Assumpsit, [or Debt, or, as the action may be.]
C. D. }

This cause came on to be heard upon the demurrer of the said C. D. to the

Journal Entries.

declaration of the said A. B., and the court being fully advised in the premises, are of the opinion that the declaration aforesaid, and the matters therein contained, are sufficient in law to support this action; whereupon the said C. D. moved the court for leave to plead to the said declaration as if his said demurrer were withdrawn;^a and it is therefore ordered that the said C. D. plead to the said declaration within — days, and that he pay the costs since filing the demurrer, taxed to — dollars — cents, within — days, and in default thereof, that execution issue therefor, and this cause is continued.

2. *When the Demurrer to one Count of the Declaration is sustained, and Trial on the other issues, and Judgment.*

A. B. }
v. } In Assumpsit, [or Debt, or, as the case may be.]
C. D. }

This cause came on to be heard upon the demurrer of the said C. D. to the [first] count of the declaration of the said A. B., upon consideration whereof the court are of the opinion that the said [first] count of said declaration, and the matters therein contained, are not sufficient in law to maintain said action; therefore it is considered that as to said [first] count of said declaration, the defendant thereof go hence without day, &c., and recover of the plaintiff his costs in that behalf expended, taxed at — dollars — cents; [And thereupon came the parties by their attorneys, or, if the issue of fact is tried at a subsequent day, proceed thus:

A. B. }
v. } In [Assumpsit.]
C. D. }

This day came again the parties by their attorneys, proceeding as follows:] and to try said issues to the country, came a jury, to wit, [E. F., &c. the names of the jury,] who being empannelled and sworn the truth to speak upon the said issues joined between the parties, upon their oaths do say, that, [&c., here enter the verdict, affirming or negating, in the language of the pleadings, the issues submitted to the jury.] It is therefore considered by the court that the plaintiff recover of the defendant the said sum of — dollars, [&c., entering the judgment in the usual form in debt, or for damages, as the action may be; for which, see *infra*, Form 5.

3. *When the Plaintiff's Demurrer to a plea in Abatement is sustained— Judgment that the Defendant answer over.*

A. B. }
v. } In Assumpsit, [or, Debt, or, as the case may be.]
C. D. }

This cause came on to be heard upon the demurrer of the said A. B. to the

(a) See ante, p. 834.

Journal Entries.

plea in abatement of the said C. D.; upon consideration whereof, the court are of the opinion that the said plea in abatement, and the matters therein contained, are not sufficient in law to quash the writ [and declaration] of the said A. B. It is therefore considered that the said C. D. do further answer to said writ and declaration.

4. *When the Defendant's Demurer to a Replication to a plea in Abatement is overruled — Judgment for the Plaintiff that the Defendant answer over.*

A. B. }
v. } In Assumpsit, [or Debt, or, as the case may be.]
C. D. }

This cause came on to be heard upon the demurrer of the said C. D. to the replication of the said A. B. to the plea in abatement of the said C. D.; upon consideration whereof, the court are of the opinion that said replication, and the matters therein contained, are sufficient in law to maintain the said writ [and declaration] of the said A. B. It is therefore considered that the said C. D. do further answer to said writ and declaration.

5. *When the Defendant's Demurrer to a Declaration or Replication is overruled and Damages, &c., assessed by a Jury.—Judgment for the Plaintiff.*

A. B. }
vs. } In [Assumpsit.]
C. D. }

This cause came on to be heard upon the demurrer of the said C. D. to the [declaration, or replication.] of the said A. B., and was argued by counsel, and the Court being fully advised in the premises, are of opinion that the [declaration, or replication,] aforesaid, and the matters therein contained, are sufficient in law to support this action.*

If the action is Assumpsit proceed as follows:— Whereupon, it is considered, that the said A. B. ought to recover his damages against the said C. D. by reason of the premises, and the said A. B. demanding a jury to assess the same, a jury being called, came, to wit: E. F. [&c.] who being empannelled and sworn, well and truly to assess the damages sustained by the said A. B. *by reason of the non-performance of the promises of the said C. D. in the declaration mentioned,* upon their oaths do assess the same to — dollars;— Therefore, IT IS CONSIDERED, that the said A. B. recover of the said C. D., the sum of — dollars, his damages aforesaid, in form aforesaid assessed, and also his costs in this behalf expended, taxed to — dollars.

*But if the action be Debt upon a penal bond and breaches assigned, proceed as follows from the *—* Whereupon it is considered, that the plaintiff

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ought as well to recover against the defendant, his debt, as also to have execution for so much thereof as may be due according to equity; and thereupon the plaintiff [*or defendant*] demanding a jury to ascertain the same, [*or say, because the said damages are unknown to the Court,*] it is ordered that a jury be empannelled; and thereupon, a jury being called came, to wit, E. F. [&c.] who, being empannelled and sworn to ascertain the amount now equitably due to the plaintiff by reason of the premises, upon their oaths do say, that the sum of — dollars is now due to the plaintiff in that behalf according to equity. Therefore it is considered that the plaintiff recover of the defendant said sum of — [*here insert the amount of the penalty of the bond,*] dollars, and that execution issue herein against the defendant for the said sum of — dollars, the said amount now due according to equity; and also for the costs of the plaintiff herein expended taxed to — dollars — cents.

*If the action be DEBT on a single bill, record or simple contract, &c., proceed from the * as follows:*] — Whereupon it is considered, that the plaintiff ought as well to recover against the defendant his debt, as also his damages for the detention thereof; and thereupon the plaintiff [*or defendant*] demanding a jury to ascertain the same; [*or say, but because the said debt and damages are to the court unknown,*] it is ordered that a jury be empannelled,² and thereupon, a jury being called, came, to wit, E. F., [&c.] who being empannelled and sworn to inquire as well of the said debt as of the said damages, upon their oaths do say, that the defendant doth owe to the plaintiff the sum of — dollars, and they assess his damages by reason of the detention thereof, to — dollars. It is therefore considered that the plaintiff recover of the defendant the sum of — dollars his said debt, and — dollars his damages aforesaid, assessed, and also his costs herein taxed to — dollars — cents.

If the action be in COVENANT the form will be precisely the same as in the above form in Assumpsit, except substituting the word "covenants" for the word "promises," in that form.

If the action be in TRESPASS or CASE, the form will be precisely the same as the above form in Assumpsit, except substituting the word "grievances" for the words "non performance of the promises of the said C. D." in that form.

6. When the Defendant's Demurrer to a Declaration or Replication is overruled—Damages assessed by the Court.

*If the action be Assumpsit, Covenant, Trespass or Case, follow the preceding form, (No. 5,) to the * and then proceed as follows:*] — Whereupon it is

(a) If the judgment is entered on the demurrer and the jury is afterwards called, the entry would begin at the (a) thus:

A. B. }
vs. } — In Debt.
C D. }

This day came again the parties by their attorneys, and thereupon came the jury, to wit, E. F., [&c., proceeding as above.

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considered, that the plaintiff ought to recover his damages against the defendant, by reason of the premises; and neither party requiring a jury, and the court being fully advised in the premises, do assess the same to — dollars. It is therefore considered, that the plaintiff recover of the defendant the said sum of — dollars, his damages aforesaid assessed, and also his costs herein taxed to — dollars — cents.

7. *The like in Debt on a penal bond, breaches assigned.*

*Follow the preceding form No. 5, to the *, and then proceed as follows:—* Whereupon it is considered that the plaintiff ought as well to recover against the defendant his debt as also to have execution for so much thereof as may be due according to equity; and thereupon neither party demanding a jury and the Court being fully advised in the premises do find that the sum of — dollars is now due from the defendant to the plaintiff, according to equity. Therefore it is considered, that the plaintiff recover of the defendant the said sum of — [here insert the amount of the penalty of the bond,] dollars, his debt aforesaid; and that the execution issue herein against the defendant for the sum of — dollars, the said amount now due according to equity, and also for the costs of the plaintiff herein taxed to — dollars — cents.

8. *The like in Debt on a single bill, record, promissory note or simple contract, &c.*

*Follow the preceding form No. 5, to the *, and then proceed as follows:—* Whereupon it is considered that the plaintiff ought as well to recover against the defendant his debt, as also his damages for the detention thereof. And thereupon neither party demanding a jury, and the court being fully advised in the premises, do find that the defendant doth owe to the plaintiff the sum of — dollars, and do assess his damages by reason of the detention thereof, to — dollars. It is therefore considered, that the plaintiff recover of the defendant the sum of — dollars, his said debt, and — dollars, his damages aforesaid, assessed, and also his costs herein taxed to — dollars — cents.

9. *When the Plaintiff's Demurrer to a Plea or Rejoinder is sustained— Judgment for the Plaintiff.*

A. B. }
vs. } In Assumpsit.
C. D. }

This cause came on to be heard upon the demurrer of the said A. B. to the

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plea, or, rejoinder, of the said C. D., and was argued by counsel, and the court being fully advised in the premises, are of opinion that the said plea, or, rejoinder, and the matters therein contained, are not sufficient in law, to bar the said A. B. from his said action: Whereupon, it is considered that the said A. B., [&c., following one of the four preceding forms as the case may require.

10. *When the Defendant's Demurrer to one Count of the Declaration is overruled, and damages assessed thereon; and trial, verdict and judgment in assumpsit on the issue in fact; verdict and judgment for the Plaintiff.*

A. B. }
v. } In [Assumpsit.]
C. D. }

This cause came on to be heard upon the demurrer of the said C. D. to the [first] count of the declaration of the said A. B.; upon consideration whereof, the court are of the opinion that the said [first] count of said declaration and the matters therein contained, are sufficient in law to support this action; wherefore the said plaintiff ought to recover his [damages thereon, or, if the action be debt say: debt and also his damages for the detention of the same.] But because it is unknown to the court here what damages the plaintiff has sustained by reason thereof, it is ordered that the jury, who shall try the issues above joined between the said parties, whereon the said parties have put themselves upon the country, shall also inquire of, and assess the damages aforesaid, upon said [first] count of said declaration, until which time judgment thereon is stayed. [*Here enter the continuance, if the trial upon the issue of facts is continued, thus: and the cause is continued.*]

The trial of the issue is entered as follows:]

This day came the parties by their attorneys; and as well to try the issues above joined, whereon the said parties have put themselves upon the country, as to inquire what damages the said plaintiff has sustained by reason of the [premises in said first count of said declaration mentioned, or, if in debt, say: the detention of said debt.] came the jury to wit: E. F., G. H., [&c., naming the jury.] who being empannelled and sworn the truth to speak, as well upon the said issue joined between the parties, as to assess said damages, upon their oaths do say, as to the said issues joined between the said parties to be tried by the country, that, [*here enter the verdict affirming or negating in the language of the pleadings, the issues submitted to the jury. As to the verdict and judgment in debt, covenant, trespass, case, see post, chapters 22 to 25. In assumpsit upon the general issue the verdict and judgment would be thus:* the said defendant did assume and promise, in manner and form as the said plaintiff in his said [second and the subsequent counts] of his

Journal Entries.

said declaration, hath complained against the said defendant; and they assess the damages of the plaintiff by reason of the premises in said counts mentioned to — dollars — cents. And the jurors aforesaid, upon their oaths aforesaid, also say, that they assess the damages of the plaintiff by him sustained by reason of the premises in the said [first] count of the said declaration mentioned to — dollars — cents, amounting in the whole to — dollars. Therefore it is considered, that the said plaintiff recover of the said defendant his said damages in form aforesaid assessed by the jury, and also his costs herein in that behalf expended, taxed to — dollars — cents.

11. *When the Plaintiff's Demurrer to a Plea in abatement is overruled — Judgment for the Defendant.*

A. B. }
v. } In Assumpsit, [or Debt, as the case may be.]
C. D. }

This cause came on to be heard upon the demurrer of the said A. B. to the plea in abatement of the said C. D.; on consideration whereof, the court are of the opinion that the said plea in abatement, and the matters therein contained, are sufficient in law to quash the said writ of said plaintiff. It is therefore considered, that the said writ of the said plaintiff be quashed, and that the defendant go hence thereof without day and recover of the plaintiff his costs herein taxed to — dollars — cents.

12. *When Plaintiff's Demurrer to a Plea is overruled — Judgment for the Defendant.*

A. B. }
v. } In Assumpsit.
C. D. }

This cause came on to be heard upon the demurrer of the said A. B. to the plea of the said C. D., and was argued by counsel, and the court being fully advised in the premises, are of opinion that the said plea and the matters therein contained, are sufficient in law to bar the said A. B. from his action against the said C. D. Therefore it is considered, that the said C. D. go hence without day, and recover of the said A. B. his costs herein taxed to — dollars.

Journal Entries.

13. *When the Defendant's Demurrer to the Declaration is sustained — Judgment for the Defendant.*

A. B. }
v. } In Assumpsit.
C. D. }

This cause came on to be heard upon the demurrer of the said C. D. to the declaration of the said A. B. *and was argued by counsel*, and the court being fully advised in the premises, are of opinion that the said declaration and the matters therein contained, are not sufficient in law to maintain the action of the said A. B. against the said C. D. Therefore it is considered that the said C. D. go hence without day, and recover of the the said A. B. his costs herein taxed to ——— dollars.

14. *When the Defendant's Demurrer to a Replication is sustained — Judgment for the Defendant.*

A. B. }
v. } In Assumpsit, [or Debt, or as the case may be.]
C. D. }

This cause came on to be heard upon the demurrer of the said C. D. to the replication of the said A. B., on consideration whereof the court are of the opinion that the said replication and the matters therein contained are not sufficient in law to support said action. Therefore it is considered, that the said plaintiff take nothing by his said [writ, or, declaration, &c.] and that said defendant go thereof without day, and recover of the plaintiff his costs, in this behalf expended, taxed to ——— dollars ——— cents.

CHAPTER XV.

AMENDMENT BEFORE JUDGMENT.

1. The statute.
2. Amendment of pleadings.
3. Amendment of process.

1. *The statute.*

The history of the English law in regard to amendments, would illustrate the common and natural tendency of all men, at all times, where an abuse exists in government, morals, or conduct, to correct the abuse a little too thoroughly.

In early times, the English courts permitted parties to amend their pleadings, as well after as before judgment was pronounced, and even after the judgment was entered. If any mis-entry had been made, it was corrected by the minutes, or by the recollection of the judges.^a

But under this practice of amending records, the judges altered and falsified their own records for sinister purposes, by making erasures and amendments privately; and this abuse became so great, that in the reign of Edward I. very heavy punishments were inflicted upon almost all the king's justices. The succeeding judges, bent on a thorough and radical reform of this great abuse, resolved that a record should be held sacred, and should not be amended at all, when enrolled and the term at an end. The rule having been thus established, their successors found themselves tied down to a reform, by which manifest errors, slips of the pen and misspellings, occasioned the reversal of meritorious judgments; and such palpable injustice was thereby occasioned, that the British Parliament have, from time to time ever since, been endeavoring to reform the reform, and have passed from fifteen to twenty statutes for that purpose.^b

Many of the provisions of these statutes were adopted into the laws of this State; but we have at last got back again to very near the time of Edward I., so far as respects amendments before judgment; for, our own statute now provides,^c that "the court in which any action shall be pending, shall have power to allow parties to amend any PROCESS, PLEADING OR PROCEEDING in such action,

(a) 3 Black. Com. 407.

Eliz., c. 14; 21 Ja. 1, c. 13; 16 & 17 Car. 2,

(b) 14 Ed. 3, c. 6; 9 Hen. 5, c. 4; 4 Hen. 6, c. 8; 4 & 5 Ann, c. 15, § 2, &c., &c.
c. 3; 8 Hen. 6, c. 12, 15; 32 Hen. 8, c. 20; 18

(c) 43 vol. Stat. 114, §1.

Of the Pleadings.

either in **FORM** or **SUBSTANCE**, for the furtherance of justice, and upon such terms as shall be just, at any time before or during the trial of such action, and before judgment rendered therein; provided, that if such amendment be made to any pleading, in matter of substance, as the court may in their discretion allow, the adverse party shall have time, according to the course and practice of the court, to answer the amended pleading, so as not to be prejudiced in conducting his action, prosecution or defence." The only limitation prescribed by the statute as to the amendment of process, is, that the return day of a writ, upon which a party has been arrested, shall not be changed.*

2. *Amendment of pleading.*

Before the statute above mentioned was passed, the parties sometimes failed in their action or defence in consequence of a variance between the written or parol evidence and the pleadings. This difficulty is entirely obviated by the present law.

The terms upon which an amendment will be allowed as to costs and a continuance, are left to the discretion of the court. Where the amendment does not go to the substance or merits of the case, of course the amendment will be allowed, without costs or a continuance. Where the amendment is in the substance of the pleading, and made during the trial, the cause will not probably, in general, be continued, unless the court perceive, or are satisfied from the professional statement of counsel or otherwise, that the amendment so changes the aspect of the case and the issue between the parties, that the adverse party is not, and could not be reasonably expected to be prepared to meet the new pleading by proof; or the amendment is such that considerable time is necessarily required to prepare new pleadings to make up an issue on the amendment.

If courts continue a cause as a matter of course, because, on the trial, a party amends the process, pleading or proceeding in substance, many of the evils, which this statute was intended to obviate, will still exist. If the court are satisfied that the adverse party will not be prejudiced in conducting his action or defence, in consequence of the amendment in substance, it would but encourage delay and subject the party amending to unnecessary costs, to continue the cause. Where a party has come into a court of justice to take advantage of a technical, but substantive defect in his adversary's pleading, he does not deserve much indulgence; and if he is not prepared to meet the cause on the merits, it may well be inferred that delay is sought merely for delay.

Where the cause is continued on account of amendment, it is, in general, done at the costs of the party making the amendment.

8. *Amendment of process.*

The statute above mentioned,* seems to authorize any amendment, in form or substance, for the furtherance of justice. Thus, where process is issued by or against too many plaintiffs or defendants, or in the wrong action, or the damages are too small, or there is an omission or defect in the test or indorsement upon the writ, &c., an amendment can be made.

Where the process is amended, it may be necessary to amend also the declaration, so as to conform to the amended writ.

(a) Ante, p. 843.

CHAPTER XVI.

PROCEEDINGS IN COURT BEFORE TRIAL.

SECTION I. CHANGE OF VENUE.

- II. HEARING OF EXCEPTIONS TO DEPOSITIONS.
- III. PUTTING OFF THE TRIAL AND CONTINUANCE.
- IV. DEFAULT, AND SETTING ASIDE DEFAULT.

SEC. I. CHANGE OF VENUE.

The statute provides, that in all cases in which it shall be made to appear to the court, that a fair and impartial trial cannot be had in the county where the suit is pending, the court may direct the venue to be changed to some adjoining county.^a

Inasmuch as it is held, that there is no settled rule of practice relating to changing the venue, and that it rests in the discretion of the court, and depends on the circumstances of each case,^b but little need be said upon the subject. The court will require, on an application made for this purpose, affidavits, showing a state of things which satisfies the court that no jury can be empannelled who will render a fair and impartial verdict; and an affidavit by the party, setting forth that he believes a fair and impartial trial cannot be had in the county, will not induce the court to grant the application.^c

The order changing the venue, may be in the form following.

Form of Order changing the Venue, when an impartial Trial cannot be had.

A. B. }
v. } In [Assumpsit.]
C. D. }

This day came the parties by their attorneys, and thereupon the [plaintiff, or, defendant] moved the court to change the venue in this case to an adjoining county, and filed affidavits herein showing cause therefor. On consideration whereof, and the court being of the opinion that a fair and impartial trial of this cause cannot be had in this county, it is ordered that the venue herein be and the same is hereby changed to the adjoining county of ——. And it is further ordered, that the clerk of this court transmit to the clerk of the Court of Common Pleas of said county of —, the original writ, pleadings, depositions, and other papers, filed in this cause, together with certified copies of this

(a) Swan's Stat. 684, § 134.

(b) 11 Ohio Rep. 128.

(c) Id. Ib.

Change of Venue.

and all other orders made in this cause, — days before the next term of said court in said county of —.

Where there is not a sufficient number of disinterested judges in the Court of Common Pleas to set upon the trial, the court, on application of either party, will order the fact to be entered upon the minutes of the court, and direct the trial to be had in some adjoining county.*

The judges of the Court of Common Pleas are not disqualified by interest, to try a case when the county commissioners are a party, and money is the subject of controversy.^b

Form of Order changing the Venue for want of disinterested Judges.

A. B.	}	In [Trespas.]
v.		
The Columbus and Cin-		
cinnati Rail Road Com-		
pany.		

On application of the [plaintiff, or, defendant,] and it appearing to the court that there is not a sufficient number of disinterested judges of this court, to sit upon the trial of this cause, [A. S. and T. W., two of said judges, being stockholders of the said, *The Columbus and Cincinnati Rail Road Company*, defendants in this suit, *stating the interest which disqualifies.*^c] It is therefore ordered, that the want of disinterestedness, as aforesaid, and an authenticated copy of this entry, and all other orders made in this cause, together with all the original files herein, be certified to the Court of Common Pleas of the adjoining county of —, forthwith, according to the statute in such case made and provided.

The form of the certificate of the clerk accompanying the papers, when the venue is changed, either because an impartial trial cannot be had, or the want of disinterested judges, may be in the form following :

Form of Certificate of the Clerk.

A. B.	}	In [Assumpsit.] — Common Pleas.
v.		
C. D.		

In pursuance of the statute in such case made and provided, and the order of the court hereinafter set forth : These presents certify, that the following is a true copy of the orders and minutes of the proceedings of the Court of Common Pleas of the county of —, in the above cause, therein lately pending, whereof [a fair and impartial trial could not be had in said county ; or say, a trial could not be had in that county for want of disinterested judges, to wit :]

[Here set out a transcript of the journal entries in the case from the beginning.]

(a) 43 vol. Stat. 81, §7.

(b) 3 Ohio Rep. 289.

(c) It seems the certificate must show how the judges are interested; 2 Ohio Rep. 26.

Hearing Exceptions to Depositions — Putting off Trial.

And these presents do further certify, that the papers and documents hereunto annexed, and marked respectively A. B., [&c.] are all the original files belonging to said suit.

In testimony whereof, I, F. C., clerk of said court, do hereby set my hand, and the seal of said court, at —, this — day of —, A. D. —,

[Signed] F. C., Clerk.

SEC. II. HEARING OF EXCEPTIONS TO DEPOSITIONS.

Exceptions to depositions, except for relevancy and competency, should be called up and decided before the trial; that the party relying upon the depositions, may, in case the exceptions are sustained, have an opportunity, if necessary, to move for a continuance of the cause.

Exceptions to relevancy and competency can generally be made without filing exceptions, and are usually made when a deposition is proposed to be read to the jury; but all other objections, must, in general, be made by written exceptions, filed before the trial, or at such time as the rules of practice of the circuit may require.

The causes of exceptions are stated and the form of exceptions given in a subsequent chapter.^a

In general, if an exception to form, &c., is sustained, and the deposition be material, the party desiring to use it, will of course ask a continuance of the cause.

SEC. III. PUTTING OFF TRIAL AND CONTINUANCE.

1. *Putting off the Trial.*

When a case is called, it may happen that neither party desires a continuance, yet a witness is absent, or something else intervenes, to prevent an immediate trial. This is a very common embarrassment, and one which calls forth every variety of expedient to obtain time.

The statute provides, that no cause shall be removed from its place on the docket; but all causes in which the intervention of a jury is necessary, shall be tried in the order in which they stand, unless the parties otherwise agree, or be continued until the next term.^b

When, therefore, a case is regularly called for trial, the court seem to have no control over it, except to try it or continue it, unless the parties otherwise

(a) See chapter 18.

(b) Swan's Stat. 674, sec. 107.

Continuance — Affidavit therefor.

agree. It is, however, the practice in some, and perhaps most of the circuits, to put off the trial, until an attachment, ordered for a witness, is returned; but, in that case, the cause is put off at the costs of the party who applies for the attachment; and as soon as the attachment is returned, the cause is called up and tried or continued.

2. Continuance.

The absence or sickness of counsel, or a material witness, or other cause, may require an application for a continuance of a cause.

For the purpose of continuing a cause on account of the absence of a witness, three things must, in general, be shown:

1. That the witness is really material.
2. That the party applying has been guilty of no neglect.
3. That the party expects to procure the attendance or deposition of the witness at the next term.

The usual objection which arises in practice against such an application, falls under the second head above mentioned: that the party applying has not used proper diligence to procure the witness or his testimony.

If the witness resided within the venue, and left the county after issue joined, the party applying for the continuance must show that it was no fault or omission on his part, that prevented the witness from being served with a subpoena or his deposition being taken; and, in such case, it may be necessary to state in the affidavit for a continuance, the time when the witness left; when the affiant was first informed of his absence; where the witness has gone; and by connecting these facts with the time when the issue was made up, and a subpoena issued, make it manifest, that due diligence was used, or that either the attendance of the witness could not have been obtained by the issuing of a subpoena, or that his deposition could not have been taken under a regular notice after he left the county.

A skeleton form of the affidavit for a continuance will be here given.

Affidavit for a Continuance.

A. B. }
vs. } ——— Com. Pleas. In [*assumpsit.*]
C. D. }

The said A. B., makes solemn oath that E. B., of, [&c.] is a material witness for him in this cause, without whose testimony he cannot safely proceed to the trial thereof, as he is advised by his counsel, and verily believes to be true. That, [*here state the circumstances which show the diligence of the party applying for the continuance, and the circumstances which prevented him from obtaining the testimony of the witness, as thus: on — day of —*

Causes for Continuance.

18—, this affiant sent to the place of residence of the said E. B., for the purpose of serving him with a subpoena in this cause; but the said E. B. was absent on a journey to — from whence he is not expected to return until some time after the expiration of the present term of this Court, as this affiant is informed and verily believes to be true.]

That affiant hopes and expects to procure the attendance of said E. B. [or, hopes and expects to procure the deposition of said E. B.] at the next term of this court; and that this affidavit for a continuance is not made for delay merely, but for the purposes of justice.

A. B.

Sworn to, and subscribed in open Court,

this — day of — A. D. 18 —.

Attest,

C. C., Clerk.

In general, the party who is default for pleading cannot insist upon a trial; but the rule in this respect is different in different circuits.*

(a) The following decisions as to Continuances may be useful, though the subject is one which so addresses itself to the discretion of the court, and is so regulated by peculiar local practice that no very definite rules can be applied to it.

Where the judge refused to put off the trial, on the common affidavit, requiring the defendant to state what he expected to prove by the witness, who was attorney for the plaintiff, which he refused to do, and the trial proceeded, the Supreme Court of New York set aside the verdict, observing, that the practice requiring a specification of the testimony, did not apply unless circumstances of suspicion are made to appear. 5 Cowen, 15; 6 Cowen, 577. So, where the judge at the circuit refused to put off the trial, on an affidavit that a material witness had lately removed from Lockport to the State of Ohio, as he the defendant, was informed and believed, about three months before the trial, and that he expected to procure the attendance of the witness at the next circuit, thinking the affidavit insufficient in merely stating information and belief of the witness' removal, this court held the affidavit sufficient in the first instance, no suspicion existing that delay was the object. 7 Cowen, 385. And in making the application, the defendant is not bound to offer to take the depositions of sick or absent witnesses of the plaintiff; 6 Cowen, 577; although where the opposite party offers to admit the facts to which the witness is expected to testify, the trial will, notwithstanding the absence of the witness, be allowed to proceed; 14 Johns. 341; but not where he merely offers to admit that the witness would, if present, testify

to the facts supposed in the affidavit on which the motion to postpone is founded. 7 Cowen, 389.

The same rule appears to exist in the English courts. Thus, they have put off a trial, until a commission should go to examine a material witness abroad who refused to attend, and until the deposition should be certified. 1 W. Bl. 512. They have refused it, however, in another case where it did not appear that there was any likelihood of the witness' return; 1 W. Bl. 515; and the same, where the witness did not go abroad until after notice of trial was given, and he might consequently have been served with a subpoena in sufficient time; Barnes, 442; and they will also, it seems, refuse it, if the party applying have conducted himself unfairly, or have been the cause of any improper delay.

Even where the court had twice before put off the trial, on account of the absence of a material witness on a whaling voyage, and the defendant applied a third time to put off the trial, on account of the witness being still absent, the court granted the application, upon the terms of the defendant's bringing the money into court, or giving security for it to the satisfaction of the master. MS. E. 1820, cited 2 Chit. Archb. 902. So, where the copy of a judicial document in the West Indies, was stated to be material and necessary evidence for the defendant, the court put off the trial, to give time to procure it; 1 D. & R. 159; even in an action of libel, 4 D. & R. 830.

Where the defendant's attorney was so ill, that he could not attend, the court upon application put off the trial. 3 Younge & Jerv. 261.

Order of Continuance → Default, and setting it aside.

The order for the Continuance may be in the form following:

A. B. }
 vs. } In *Assumpsit*.
 C. D. }

On motion of the plaintiff this cause is continued at his costs.

And, on motion of defendant, it is ordered, that said costs taxed at — dollars — cents, be paid by the plaintiff within [twenty] days, and in default thereof, that execution issue for the same.

SEC. IV. DEFAULT, AND SETTING ASIDE DEFAULT.

If the defendant has failed to plead or the plaintiff to reply, or either party is otherwise in default, on motion, the court will permit (upon such terms as the rules of practice of the circuit prescribe) the default to be set aside, and the issue to be made up. If the plaintiff is in default, and under the rules, the court refuse to set the same aside, a judgment of non-suit is in general entered; and the plaintiff will thereby be compelled to bring a new action.

If the defendant does not, or, under the rules of the court cannot obtain leave to plead, judgment is entered against him by default; and if neither party require a jury, the court assess the damages.*

If one of the defendants has plead, the default is entered against the others, but no judgment can, in general, be taken on the default, until the issue is tried or disposed of; and the same jury which tries the issue may assess the damages. If the issue is decided against the plaintiff, and the cause of action is such, that, if all the defendants had plead, a verdict could not be rendered in favor of one, without discharging the others, a general judgment, as well in favor of the party who plead, as the defendant who made default, must be rendered.†

In a joint suit, however, against the makers and indorsers of negotiable

So, where a libel was published immediately before the assizes, with an intent to influence the jury, the court upon application put off the trial. 1 Berr. 499, 510; 7 Moore, 87; S. C. S. B. & B. 272.

If, from the nature of the application, it may be suspected that it is made merely for the purpose of delay, the court usually require that the affidavit shall state the cause of action, and the evidence expected from the witness, in order that they may judge if it be material, and that it also state circumstances from which they may infer the probability of the witness' return within a reasonable time. See 8 Berr. 1513; 1 W. Bl. 510, 436. In no case, however, according to the English practice, is it necessary to state the

name of the witness, on account of whose absence the party cannot proceed to trial. 2. D. & R. 420; 4 D. & R. 833. Formerly, it seems, this affidavit must have been made by the party himself; Barnes, 437; but the affidavit of the attorney in the cause has since been deemed sufficient; Peake, 97; and even the affidavit of the attorney's clerk, if it state that he is particularly acquainted with the circumstances of the cause, and has the management of it. 1 H. Bl. 637. In deciding upon an application of this kind, the court will not in general enter into any inquiry as to admissibility of the evidence required. See 1 D. & R. 159.

(a) Swan's Stat. 671, sec. 98.

(b) 3 Day, 308, Bac. Ab. Title Verdict.

Default.

paper, under the statute,^a and where one of the defendants pleads a personal discharge, such as infancy, bankruptcy, &c., a default of one of the defendants may entitle the plaintiff to a judgment, notwithstanding a verdict in favor of the defendant who plead.

(a) 42 vol. Stat., 72; 43 vol. Stat. 67.

CHAPTER XVII.

THE JURY.

- SECTION I. THE SELECTION OF, AND THE ISSUING OF THE VENIRES FOR GRAND AND PETIT JURIES.**
- II. FORM OF VENIRES FOR GRAND AND PETIT JURY.**
- III. WHEN AND HOW VENIRE SERVED AND RETURNED, AND FORM OF RETURN.**
- IV. SPECIAL OR STRUCK JURY.**
1. In what cases allowed and how obtained.
 2. Form of the order of the court for a special jury.
 3. Notice of striking for a special jury.
 4. How struck.
 5. How special jury summoned, &c.
 6. Costs incident to a struck jury.
- V. JURY PROCESS, &c., WHEN SHERIFF INTERESTED.**
- VI. VIEW BY A JURY.**

SEC. I. THE SELECTION OF, AND THE ISSUING OF THE VENIRES FOR GRAND AND PETIT JURIES.

In this state a venire is not issued in each cause to be tried, but a general venire is issued by the clerk of the court of common pleas for a jury, who are deemed the regular jury for the trial of the causes docketed.

The mode of selecting the persons, whose names are deposited in a box for the purpose of being drawn as jurors, is prescribed by statute.^a

The clerk of the court writes the names of the persons, selected as jurors by the trustees of the townships, upon separate pieces of paper, and puts these pieces of paper in a box. Thirty days previous to the sitting of the court of common pleas, the clerk and sheriff meet at the clerk's office, for the purpose of drawing a grand and petit jury from the box. To prevent the clerk from so arranging the ballots in the box as to determine what names will be drawn, the sheriff is required to shake the box so as to mix the ballots on which the names are written. The clerk then, in the presence of the sheriff, proceeds to draw twenty-seven ballots; the first fifteen of whom are summoned as grand jurors, and the remaining twelve are petit jurors. In Hamilton county, however, twenty-four petit jurors are selected.^b

If there be not time to draw the jury, thirty days before the court, they may be drawn and the venires issued, at any time before court.^c

(a) Stat 489, 490.

(b) Stat. 491, Sec. 7.

(c) 46 vol. Stat. 24.

 Process for, and its Service and Return.

The clerk, forthwith, issues two venires : one for the grand, and the other for the petit jury.^a

The venire requires the jury to appear on the first day of the next term of the court, at the seat of justice of the county, at 10 o'clock A. M.^b The court may, however, by order, direct the venire for the petit jury to be made returnable at the second, or any subsequent day of the term.^c

 SEC. II. FORM OF VENIRES FOR GRAND OR PETIT JURY.

—— County, ss.

The State of Ohio,

[SEAL.]

To the Sheriff of said County Greeting :

We command you, that without delay you summons A. B., [*&c., names of the jurors.*] to be and appear before our court of common pleas within and for the county of ——, at the court-house in, [*naming the seat of justice.*] in said county, on the —— day of, [*the first day of the term, or such day for the petit jury as the court may advise.*] next, at 10 o'clock, forenoon, and so from day to day until discharged ; then and there to serve as [grand jurors, or say petit jurors, as the case may be,] within and for said county : and how you shall execute this writ, make appear to our said court, on the first day of their next term, and have you then and there this writ. Witness C. C., clerk of said court, this —— day of ——, A. D. ——.

C. C., Clerk.

 SEC. III. WHEN AND HOW VENIRES SERVED AND RETURNED, AND FORM OF RETURN.

The jurors must, in general, be served ten days before court.^d

The venire is served by reading it to the juror, or by leaving, at his usual place of abode, a note or memorandum in the words following :^e

I am commanded to summons you, A. B., [*the name of the juror.*] to appear before the [court of common pleas, or, supreme court, as the case may be,] to be holden in —— on the —— day of —— next, to serve as a [grand juror, or, petit juror, as the case may be.]

S. S., Sheriff of —— County.

[Date].

The officer must indorse on the venires the names of the jurors, and the time when summoned, and return the same according to the command of the writs, or order of the court.^f

(a) Swan's Stat. 490, sec. 4; 6 Ohio Rep. 19.

(d) Stat. 491.

(b) Stat. 490, sec. 4.

(e) Stat. 491, sec. 6.

(c) 44 vol. Stat. 28. See 46 vol. Stat. 24.

(f) Stat. 491, sec. 6; 46 vol. Stat. 24.

Special or Struck.

The return may be in the form following :

FORM OF RETURN TO A VENIRE.

In obedience to the command of this writ I summoned the within named :

- A. B., June 20, 18 —.
- C. D., June 21, 18 —, &c.
- E. F., dead.
- G. H., does not reside in my baliwick.

S. S., Sheriff of ——— County.

SEC. IV. SPECIAL OR STRUCK JURY.

1. *In what cases allowed and how obtained.*

Either party, in a civil case, can have a special or struck jury, upon application to the court for that purpose.^a

The first step to be taken by the party who desires a struck jury, is, to apply to the court for an order allowing the same. This must be done before the trial term, and is usually done at the appearance term, after the return of the summons.

2. *Form of the order of the Court for a Struck Jury.*

A. B. }
v. } In *Assumpsit*.
C. D. }

This day came the parties by their attorneys, and on motion of the said A. B., it is ordered by the court that a special jury be struck for the trial of this cause. Continued.

3. *Notice of striking for a Special Jury.*

The next step to be taken is, for the party who obtains the order, to give notice to the opposite party, and to the clerk of the court, of the time of striking the jury. The notice must be served at least eight days previous to the time fixed for striking the jury,^b and the day appointed for striking the jury must be at least thirty days previous to the sitting of the court.^c

(a) Swan's Stat. 494, sec. 21. (b) Swan's Stat. 495, sec. 22. (c) Swan's Stat. 495, sec. 23.

Form of notice of the Striking of a Jury.

A. B. }
 v. } ——— Com. Pleas. In [*Assumpsit.*]
 C. D. }

To C. D. or his attorney ; and to the clerk of said court :

A jury will be struck in this cause on the — day of —, A. D. 18 —, between the hours of 8 A. M. and 5 P. M. of the clock, at the clerk's office of said court.

A. B. by I. S., his Attorney.

[Date.]

4. *How struck.*

The clerk will attend at his office, at the time mentioned in the notice, and, in the presence of the parties, or such of them as may be present for that purpose, select from the number of persons qualified to serve as jurors within the county, forty such persons as he shall think most indifferent between the parties, and best qualified to try such cause ; and the party applying for the struck jury, his agent or attorney, shall first strike off a name, and then the opposite party, his agent or attorney, another ; and so, alternately, until each shall have struck off twelve ; and the sixteen remaining shall be summoned to serve as the jury in the cause.*

If the opponent of the party who applied for the special jury, be not present to strike off the names, nor any person on his behalf, then the clerk must strike for the party not attending.

If the clerk of the court is interested in the cause, or related to either of the parties ; or, if it appears probable to the court that he is not indifferent between them, then the court nominate two proper persons, who are indifferent between the parties, to strike the jury, and who accordingly perform that duty."

5. *How Special Jury summoned, &c.*

The clerk makes out a fair list of the sixteen persons not stricken off, and certifies the same, under his hand, to be the list of the struck jury, and delivers the same to the sheriff, together with the venire.

The sheriff annexes the list to the venire, and summons the jury, according to the command of the writ."

(a) Swan's Stat. 495, sec. 22. (m) Swan's Stat. 495, sec. 22. (n) Swan's Stat. 495, sec. 22.

Special or Struck — View, by.

Form of List of Struck Jury.

A. B. }
 v. } In Assumpsit. ——— Com. Pleas.
 C. D. }

I do hereby certify, that the following is the list of the jury struck in the above cause.

A. J., [&c.]

Attest: C. C., Clerk
 ——— Com. Pleas.

[Date.]

The venire can be readily made out from the form already given, the jury being described as the jury struck to try the cause of A. B. v. C. D., &c.

The jury are called as they stand upon the panel; and the first twelve who appear and are not challenged, or shall be found duly qualified and indifferent, shall be the jury, and sworn to try the cause.*

6. *Costs incident to a Struck Jury.*

The party applying for a struck jury must pay the fees for striking the same, and one dollar per day for each juror attending; and is not allowed any thing therefor, in the taxation of costs, unless the court is of the opinion that the cause required such struck jury, in which case these extra expenses are taxed in the bill of costs.

SEC. V. JURY PROCESS, ETC., WHEN SHERIFF INTERESTED.

When the sheriff is interested in a cause, the party in interest opposed to that of the sheriff, may apply to the court, who will direct a special venire to issue to the coroner of the county, commanding him to summon a jury having the qualifications herein before mentioned, to try such cause; and where both the sheriff and coroner are interested, or in case of the death, resignation, or absence from the county of both the sheriff and the coroner, then, and in either of those cases, the venire facias or other process, may be directed to such discreet, disinterested person, as the court may name.^a

SEC. VI. VIEW BY A JURY.

If it is made to appear to the court that it is proper or necessary that the jurors, who are to try an issue, should have a view of the messuages, lands or

(a) Swan's Stat. 495, sec. 22.

(q) Swan's Stat. 493, sec. 17

View, by.

place in question, in order to their better understanding the evidence that may be given on the trial of the issue, an order will be made by the court for the issuing of a special *distringas*, or *habeas corpora juratorum*, by which the sheriff or other officer, to whom the same is directed, will be commanded to have six or more of the first twelve jurors named in the panel to which such writ is annexed, at the place in question, who then and there shall have the matters in question shown to them by the two persons named in said writ, to be appointed by the court; and the sheriff or other officer who executes the writ, must, by a special return on the same, certify, under his hand, that the view hath been made according to the command of said writ.*

The expenses of taking the view are taxed in the bill of costs.

No evidence is taken on either side at the time of taking the view.

If no view is had under the writ, or if a view is had by any of the jurors, and whether the first six or more of the twelve who are first named in the writ or not, yet the trial must, notwithstanding, proceed; for, no objection can be made on either side for want of a view, or because not made by any particular number of jurors, nor, indeed, on account of the want of a proper return to the writ.*

Form of Order for a Special Writ of Habeas Corpora Juratorum.

A. B. }
v. } In [Ejectment.]
C. D. }

On motion of the plaintiff, and upon reading the affidavit of A. B., it is ordered, that a special writ of *Habeas Corpora Juratorum* be issued to the sheriff of this county, according to the form of the statute in that case made and provided, by which said sheriff shall be directed to have six or more of the first twelve jurors, named in the common panel for the next term of this court, at the place in question, [&c.,] to view the same, on Tuesday the — day of — next, at 11 o'clock in the forenoon of the same day; which said jurors shall meet at the house of L. M., in the *township* of — in said county, and shall then and there be refreshed, at the equal charge of both parties; and that L. L., on the part of the plaintiff, and T. S., on the part of the defendant, to be named in the said writ, shall show the place in question to the said jurors; and this cause is continued.

Form of Habeas Corpora on the above Order.

[*Make out a copy of the common panel of the petit jury, and annex the same to the following writ:*]

The State of Ohio.

To the Sheriff of — County, Greeting:

Whereas, by our *venire facias*, you have been commanded to summon the

(r) Swan's Stat. 494, sec. 19.

(s) Swan's Stat. 94, sec. 20.

View, by.

persons named in the panel to this writ annexed, being the jurors of the petit jury, to be summoned at our next term of the Court of Common Pleas of said county, between (among others) A. B., plaintiff, and C. D., defendant, in a plea of Ejectment, [*as the cause of action may be,*] to make that jury: Now we do command you, in the meantime, according to the form of the statute in that case made and provided, that you have six of the said jurors, or as many more of them as you shall think fit, to take a view of the place in question, on Tuesday the — day of — next, at 11 o'clock in the forenoon of the same day, at, [*as in the order,*] in your county; and from thence proceed to view the said place in the presence of L. L., on the part of the plaintiff, and T. S., on the part of the defendant, appointed by our said Court of Common Pleas to show the said place to such of the said jurors as shall come to view the same; and what manner you shall have executed this our command, make appear to our said Court of Common Pleas, on the first day of their next term, at the court house in —, and have then there this writ. Witness, [&c.]

CHAPTER XVIII.

PREPARATIONS FOR TRIAL — EVIDENCE, &c.

SECTION I. WRITTEN EVIDENCE OTHER THAN DEPOSITIONS.

1. Laws.
2. Records.
3. Official Registers, and writings quasi of record.
4. Written instruments of a private nature.

II. NOTICE TO PRODUCE PAPERS.

III. INSPECTION OF PUBLIC BOOKS.

IV. PROCEEDINGS TO COMPEL THE PRODUCTION OF BOOKS, PAPERS, &c.

V. BILL OF PARTICULARS AND COPIES.

VI. DEPOSITIONS.

1. In what cases they may be taken.
2. Before whom they may be taken.
3. The notice and its service.
4. How the attendance of witnesses before the officer enforced.
5. Form of oath to witnesses, and form and requisites of depositions, and how transmitted, &c.
6. Filing depositions.
7. Opening of depositions.
8. Exceptions to depositions.
9. In what cases depositions used on the trial below may be used on appeal.
10. Dedimus Potestatum.

VII. SUBPŒNA, AND ATTENDANCE OF WITNESSES.

1. The præcipe for, and form of a common subpœna.
2. Service of subpœna and return thereto.
3. Subpœna duces tecum.
4. Attachment against a witness for disobeying a subpœna with forms.
5. Habeas Corpus ad testificandum.

Authentication of Laws — Records of Courts.

SEC. I. WRITTEN EVIDENCE OTHER THAN BY DEPOSITIONS.

1. *Laws.*

Acts of the Legislature of Ohio may be read in evidence from the volumes printed by the State printer, whether the same be general or mere local laws.^a

Acts of the legislatures of other States of the Union, may be authenticated by exemplified copies, having the seal of the State affixed thereto;^b without the attestation of any officer, or any other proof.^c In general, however, the volumes of statutes purporting to be published by authority of other States, are admissible, as prima facie evidence, to prove the statute laws of those States.^d What the law of another State is, is a question of fact, triable by jury and proveable if necessary by witnesses.^e

It is said by Mr. Justice Story, that "in general, foreign laws are required to be verified by an oath, or by some equally high authority, and are usually authenticated by an exemplified copy under the great seal of the State; or by a copy proved to be a true copy by a witness who has examined and compared it with the original; or by the certificate of an officer properly authorised by law to give the copy; which certificate must itself also be duly authenticated."^f

2. *Records of Courts.*

Records of the courts of this State, and of the supreme, circuit and district courts of the United States, may be proved by office copies, duly certified by the clerk, having the custody thereof, under the seal of the court.^g

The certificate of the clerk in such case is usually in the form following:^h

Clerk's Certificate to authenticate a copy of a record.

The State of Ohio, *Hamilton* county, ss. I hereby certify, that the foregoing is truly taken and copied from the records of the proceedings of the *Court of Common Pleas*, within and for said county of *Hamilton*.

In testimony whereof, I do hereby subscribe my name, and affix the seal of said court, this — day of — A. D., 18 —.

J. S., Clerk of said Court.

The records and judicial proceedings of the courts of record of other States of the United States, may be authenticated by exemplified copies, attested by

(a) 11 Ohio Rep. 280.

(b) Act of Congress, Swan's Stat. 56.

(c) 11 Wheat. 392; 5 N. Hamp. 367.

(d) 4 Cranch, 384, 388; 3 Pick. 293; 5 Leigh 471; 6 Binn. 321; 7 Moar. 585; 12 S. & R. 208; 1 Dall. 458; but see 4 Conn. 517; 6 Conn. 490; 2 Wend. 411.

(e) 11 Ohio Rep. 255.

(f) Story's Conf. of Laws, §641, 642. See 8 Wend. 173; 5 Wend. 375; 2 Cranch, 287; 4 Conn. 517; 12 Conn. 384; 6 Wend. 475; 1 Campb. 65, n. a.; 11 Ohio Rep. 255.

(g) Wil. Pr. 78; 2 Johns. Cav. 119. See 7 Cranch 481; 9 id. 122.

(h) Wil. Pr. 76.

Authentication of Records.

the clerk of the Court, with the seal of the court annexed, if there be a seal; together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form.¹

Under this act of Congress, the clerk's certificate is the same as in the preceding form, and the certificate of the judge is usually as follows:*

I, A. B., *President Judge* of the court of *Common Pleas* in and for the county of *Hamilton*, and State of *Ohio*, do hereby certify, that J. S., who hath signed the above attestation and certificate, and to which the seal of said court is annexed, was, on the — day [*&c., the day which the certificate of the clerk purports to have been made,*] and at the time the said attestation and certificate was made, the clerk of said court, and that his said attestation and certificate is in due form of law;¹ [and that to all acts by him so done, full faith and credit are and ought to be given, in judicature and thereout.]

A. B.

[Date.]

Transcripts from the docket of a justice of the peace of this State are authenticated by the certificate of the justice.² So, a transcript from the docket of an absent justice, or a justice whose term of office has expired, may be authenticated by the certificate of the justice, or clerk of the township, or successor of such justice,¹ who has possession of the docket.²

The mode of authenticating transcripts from the docket of justices of the peace of sister States has already been noticed.³

Instead of authenticating copies of laws, records, &c., in the mode prescribed by statutes, examined copies sworn to by competent witnesses will be received in evidence, if accompanied by proof that the originals were records or public documents, kept by authority of law.⁴

The certificate of the chief justice, judge, or president of the court, is not required to authenticate a domestic record of our own courts, when it is to be used as an instrument of evidence in this State.

The orders, decrees, and minutes of the proceedings of the court of common pleas of this State, in those cases wherein no final record is required to be made, such as taking a recognizance in a criminal case, &c., are matters of record and legal evidence.⁵

Files of the court not required to be recorded, may be proved by their production, accompanied by the testimony of the clerk of the court, or by a certified copy under the seal of the court, or, if the files are lost, then by secondary evidence.⁶ But when a file of the court is to be used in another case in the

(i) Act of Congress, Swan's Stat. 56, 57, 58. (m) Stat. 507. For the form of the certificate For the construction, &c., of this act, see ante, see Swan's Trea. *ubi supra*.
p. 379, note. (n) See ante, p. 379, note.

(j) The words in brackets are unnecessary.

(o) 3 Ohio Rep. 363; 10 Ohio Rep. 278; 13

(k) Swan's Stat. 507, §. 5. For the form of the certificate see Swan's Trea. 3d ed. 179. Ohio Rep. 209.

(p) 9 Ohio Rep. 108.

(l) 47 vol. Stat. 38.

(q) 6 Ohio Rep. 251; 5 id. 485.

same court, or before an officer thereof, the original, or a copy attested by the clerk without seal is sufficient.

3. *Official Registers and Writings, quasi of Record.*

Books kept by persons in public offices, in which they are required, either by statute or by the nature of their office, to write down particular transactions, occurring in the course of their public duties, and under their personal observation, as well as all other documents of a public nature, are generally admissible in evidence,¹ and may be proved by duly authenticated copies.²

When the books themselves are produced, they are received as evidence, without further attestation.³ But they must be accompanied by proof that they come from the proper repository, and if a sworn copy, that they are kept by authority of law.⁴

Where the proof is by a copy, an examined copy, duly made and sworn to by a competent witness, as having been compared with the original record in the proper depository, is always admissible. Whether a copy certified by an officer of this state, having legal custody of the book or document, he not being specially appointed by law to furnish copies, is admissible in evidence in the courts of this state, is not settled; but the weight of authority is, that a copy given by a public officer, whose duty it is to keep the original, should be received in evidence.⁵

The statutes of this state provide for the authentication, &c. of copies from records, &c. of the following among other documents, namely:

Indentures of apprenticeship;⁶ surveyors' documents, &c. from the auditor of state's office;⁷ field notes of surveyor general's office in the office of county auditors;⁸ patents; deeds,⁹ mortgages, powers of attorney, leases, &c. from the recorder's office of the county purporting to have been executed in due form of law;¹⁰ wills admitted to probate;¹¹ depositions, plats and certificates, recorded to perpetuate evidence;¹² clearances on the canals;¹³ account books of the penitentiary;¹⁴ the account of the superintendent of the lunatic asylum;¹⁵ mortgages of personal property filed with the township clerk or recorder of the county;¹⁶ field notes, maps and documents in the office of the secretary of state

(q) 1 Greenl. Ev. 531.

(r) 1 Greenl. Ev. 533, and cases there cited.

(s) 6 Ohio Rep. 79; 10 Ohio Rep. 278; 1 Greenl. Ev. 534. Whether the original record of deeds of the recorder's office be admissible in evidence—query. 7 Ohio Rep. (part 1) 161.

(t) 3 Ohio 368. As to a consular seal see 5 Hill N. Y. 574 m.

(u) 1 Greenl. 534; 7 Pet. 51, 85; 14 Pick. 442.

(v) Swan's Stat. 67 s.

(w) Id. 120, 121.

(x) Id. 897.

(y) Id. 271.

(z) Id. 267, 780, 781, 782.

(a) Id. 995.

(b) Id. 329, 330, 327.

(c) Id. 190.

(d) Id. 628.

(e) Id. 579.

(f) 44 vol Stat. 62; 46 vol. Stat. 108.

Copies from Official Registers, &c.

of Ohio, relating to public lands in Ohio which came from the surveyor of the United States;^m minutes of the proceedings of any literary, scientific, Odd Fellows, or other benevolent associations, Masonic lodges, charters and lodges of Independent Order of Odd Fellows and Divisions of Sons of Temperance, organizing the same as a corporation, and recorded in the recorder's office of the county;ⁿ accounts, papers, &c. of the office of the board of public works;^o the official bonds of public officers, executors, administrators and guardians recorded by the auditor or treasurer of the county, or the clerk of the court of common pleas;^p certified copies of the copies of the record of deeds taken from the record of any county in the state, and recorded in the county where the land is situate;^q copies of entries, surveys and plats in the office of the recorder of the county, procured by the commissioners of the county from the surveyor of the Virginia military district.^r

A copy, however, from the proper office and officer is not, in general, admissible in evidence, except in cases where the original itself would be good evidence, if produced; unless some law makes the copy of the original evidence, not only of what the original contains, but proof of the facts stated in the original.^s

Protestations, attestations, and other instruments of publication, by a notary public, certified under his official seal, are evidence.^t

A statute of the United States provides, that all records and exemplifications of office books, which are kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereunto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, or district, as the case may be, in which such office is or may be kept; or the governor, secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said district, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. Records and exemplifications authenticated as above mentioned, have such faith and credit given to them in every court and office within the United States and Territories, as they have by law or usage, in the courts or offices of the states or territories of the United States from whence the same are taken.^u

(m) 44 vol. Stat. 65.

(n) 43 vol. Stat. 70; 47 vol. Stat. 56.

(o) 45 vol. Stat. 54.

(p) Swan's Stat. 162; 41 vol. Stat. 13; 47 vol. Stat. 30.

(q) 42 vol. Stat. 77.

(r) 46 vol. Stat. 50.

(s) 11 Ohio Rep. 261.

(t) Swan's Stat. 601, sec. 2.

(u) Act of March 27, 1804; Swan's Stat. 57.

Authentication of Official Records, &c.

、 The certificates under the above act of Congress may be in the form following:

CERTIFICATES TO AUTHENTICATE A RECORD NOT APPERTAINING TO A COURT.

1. *The Certificate of the Keeper of the Record.*

The State of *Ohio*, *Hamilton County*, ss.

I, A. B. [*here insert the official character of the keeper of the*
[SEAL.] *record,*] do hereby certify that the foregoing is truly copied from the [*here describe the office book from which the record is copied as thus: record of marriages,*] kept by authority of law, in my office, by me.^a In testimony whereof I do hereby subscribe my name, officially, and affix the seal of my said office, this — day of —, A. D. —. A. B.

2. *The Certificate of the Presiding Justice of the Court.*

The State of *Ohio*, *Hamilton County*, ss.

I, C. D., *President Judge* of the court of *Common Pleas* in and for said county, (in which the office above mentioned of the said A. B. is kept,) do hereby certify, that the said A. B. who hath signed the above certificate and attestation and to which the seal of said [*describing the office or court from which the record is taken,*] is annexed, was on the — day of — A. D. —, [*the day the certificate of A. B. purports to have been made,*] and at the time the said certificate and attestation was made, the [*here describe the official character of A. B.*] (and the keeper of the records and books of said public office;) and that the said certificate and attestation of the said A. B. is in due form and by the proper officer;^b [and that to all acts by the said A. B. so done, full faith and credit are and ought to be given, in judicature and thereout.]

[Date.]

C. D.

3. *The Certificate of the Clerk of the Court.*

The State of *Ohio*, *Hamilton County*, ss.

I, E. F., clerk of the court of *Common Pleas*, in and for said
[SEAL.] county, do hereby certify, that C. D., who hath signed the above certificate, was, on the — day of [*&c., the day the certificate of C. D. was made,*] and at the time he made the above certificate, *President Judge* of the court of *Common Pleas*, in and for said county, duly commissioned and qualified. In testimony whereof I do hereby subscribe my name and affix the seal of said court this — day of [*&c.*]

E. F., Clerk.

(a) If there be no seal of office, state that official seal appertaining to my said office.

fact thus: I do further certify that there is no (b) The words in brackets are unnecessary.

How written Instruments of a private nature Proved.

This certificate, if intended to be used out of the state, and under the statute of the United States, should be signed by the clerk of the court and not by the deputy.

4. *Written Instruments of a private nature.*

The statute dispensing with the proof of the execution of instruments in certain cases, has already been given.¹

An instrument not coming within the provision of that statute, if it have no subscribing witness, must be proved by some person acquainted with the hand writing of the party who executed it. If the instrument have a subscribing witness, the order of proof is generally as follows: 1. The witness must be produced, if living and within the county.* 2. If he be dead or not within the county, or his testimony cannot be used, his hand writing must be proved. 3. If his hand writing cannot be proved after reasonable exertions for that purpose, proof of the hand writing of the party executing the instrument, is admissible; however, when the witness cannot be produced, it has been usual for the courts in Ohio to admit proof of the hand writing of the party who executed the instrument, and this, or proof of the hand writing of the witness only, is, under proper circumstances, admissible.²

When an affidavit is not annexed to the general issue, under the statute above referred to, a certified copy of the deed, mortgage, power of attorney, or other instrument relating to land, taken from the recorder's office of the county, is received in evidence without proof of execution;³ provided the instrument be duly executed and acknowledged as provided by law.⁴ When a deed is executed under a power of attorney, a certified copy of the power should be also produced.⁵ When a deed is lost, in general, the proper order of proof is as follows: 1st. The existence of the deed. 2d. Its execution. 3d. The loss. 4th. The contents. But the evidence on these several points may be so blended together, as to authorize it to be given all at once.⁶

A will must be admitted to probate before it can become operative as a will.⁷ Entries and memoranda made by notaries, clerks and other persons in the usual course of business, may be received in evidence after the death of the persons who made them.⁸

Entries in corporation books are proved like entries in private books, by the books themselves. It must be proved that they are the books of the corpora-

(r) See ante, p. 662, note.

(s) 2 Ohio Rep. 56; 3 Id. 42.

(t) 2 Ohio Rep. 56; 6 Hill, 303; 25 Wend. 259; 19 Id. 482; 2 Hill, 609; 18 Wend. 178; 11 Id. 110. As to the mode of proof when there are several subscribing witnesses, see 11 Johns. 64; 19 Id. 386; 5 Id. 144; 4 Id. 461; 5 Cowen, 383; 6 Id. 165; 9 Id. 140; 8 Id. 620.

(u) 6 Ohio Rep. 32.

(v) 2 Ohio Rep. 55.

(w) 1 Esp. Rep. 89; 19 Wend. 484.

(x) 3 Ohio Rep. 107; 8 Ohio Rep. 81; 16 Johns. 193; Arch. Pl. 436.

(y) 8 Ohio Rep. 5, 239.

(z) 2 Hill, 537; see 2 Phill. Ev. (Cowen and Hill) 674.

 Notice to produce Written Instruments.

tion kept as such by the proper officer. It is not sufficient to prove the books to be in the hand writing of a person stated in the books themselves to be secretary, but not otherwise shown to be the proper officer.^a

 SEC. II. NOTICE TO PRODUCE PAPERS.

If the adverse party be in possession of any written instrument (other than a mere notice,)^b which would be evidence for you, if produced, you may serve either him or his attorney; as the case may be, with notice to produce it at the trial; or, that in default thereof, parol evidence will be given of its contents. Without such notice, parol testimony will not be received of its contents. Where, however, the nature of the action is such, that its form or pleadings gives the opposite party notice that he is charged with the possession of the instrument, or notice to be prepared to produce it, if necessary, to falsify his adversary's evidence, (as in trover for a promissory note,) a notice to produce is unnecessary.^c The notice must be sufficiently explicit to apprise the party of the paper required. A notice requiring the party to produce "all the letters, papers and documents touching and concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered," has been held to be insufficient.^d

The notice must be served a reasonable time before the trial; and what is reasonable time, must depend upon the circumstances of each case.^e But where the paper is in court, or so near the place where the court is sitting, that it can be obtained without delaying the trial, and without material inconvenience to the party, a notice given after the trial has commenced, will be sufficient.^f

If the opposite party fail or refuse to produce the instrument on the trial, upon proof of service of the notice, and that the paper is in his possession or power, you may introduce parol evidence of its contents; and if such evidence be imperfect, still, as the opposite party might clear up the proof by producing the paper, every presumption is against him.^g But a party has no right to take the position before the jury, in the absence of testimony, that because the paper is not produced, it would establish the fact which he alleges it would prove. It must first be shown to be in the possession of the party

(a) 10 Johns. Rep. 154; see 3 Phill. Ev. Bos. & Pal. 143; 3 Wend. 486; 6 Serg. & R. 154.

(b) Cowen and Hill) 1159, note, 802. As to the mode of proving a corporation, see 7 Wend. 539; 15 Id. 314. As to proving its seal, see 2 Phill. Ev. 1062, note, 716.

(c) 13 Johns. Rep. 40; 7 Eng. C. L. Rep. 440; 6 B. & C. 388.

(d) 13 Eng. C. L. Rep. 208; 13 Johns. 92; 17 Id. 295; 18 Wend. 505; 14 East, 274; 3

(d) Ry. & Mood. 341; see 11 Wend. 65.

(e) See 18 Wend. 505; 3 Id. 300; 7 Cowen, 739; 7 Wend. 216.

(f) 18 Wend. 505; see 4 Burr. 2484; 1 Moody & M. 235.

(g) 7 Wend. 34.

Inspection of Public Books.

served with the notice, and some testimony of its contents applicable to the case given, before any foundation can be laid or presumptions can be fairly raised, on account of its non production.^a

If the instrument be produced, the party giving the notice to produce it, may introduce it in evidence or not, as he may choose.ⁱ But if introduced, its execution must be proved in like manner as if no notice had been given, &c.^j If, however, the party who produces the instrument under the notice, is a party to it, and claims a beneficial interest under it, the party calling for the instrument need not prove its execution.^k And whether the party producing it, on notice, claim a beneficial interest under it or not, its genuineness need not be proved.^l

The notice may be in the form following :

Notice to produce Written Instruments on the Trial.

A. B. }
v. } ——— Common Pleas. In [Assumpsit.]
C. D. }

To A. B. [or, C. D. :]

You will please produce on the trial of the above cause, the following described written instruments, otherwise I shall offer parol evidence of their contents : [*Here describe the instruments with such particularity as to apprise the party of the papers wanted.*]

Yours, &c.,

[Signature.]

[Date.]

SEC. III. INSPECTION OF PUBLIC BOOKS.

A party has a right to inspect and take copies of such books, &c., as are of a public nature, and in which he has an interest, if they be material to the suit.^m

Thus, in England, the books of a manor, parish books, the books of the post office, of the Bank of England and the East India Company, have been considered as public books, which every person, having an interest therein, has a right to inspect.ⁿ So, the books of a corporation are in the nature of public books ;^o and every member of the corporation, having an interest therein, has a right to inspect and take copies of them, for any matter that concerns himself, though it be in dispute with others.^p If the suit, however, be between the corporation

(b) Id. 1b.

(i) 2 Wash. C. C. Rep. 482.

(j) 2 Camp. 94 ; 8 East, 548, 549 ; 1 Arch.

Pr. 169.

(k) 3 Taunt. 62 ; 7 Eng. C. L. Rep. 382 ; 12 Johns. 223 ; 12 Eng. C. L. Rep. 327 ; 17

Johns. Rep. 158 ; 13 Eng. C. L. Rep. 99.

(l) 7 Wend. 216.

(m) 1 W. Bl. 44.

(n) 2 Ld. Raym. 851 ; 1 Tidd, 593, 594 ; 1

(o) 3 Taunt. 62 ; 7 Eng. C. L. Rep. 382 ; 12 Stra. 304, 354 ; Arch. N. P. Prac. 392.

(p) Stra. 954.

(p) Stra. 1223.

Proceedings to compel the production of Books, Papers, &c.

and a stranger, inspection will not be granted.^a In New York, where the book or instrument to be inspected was the immediate foundation of the action, the court granted the motion.^c

If, therefore, it become necessary, in the preparation of a case for trial, to obtain an inspection of any public books or papers, and permission to inspect such parts of them as relate to the subject matter in dispute, has been demanded and refused, an application may be made to the court, by motion, for leave to inspect them, and to take copies of such entries as may relate to the subject in dispute.^d

The inspection, when granted, is confined to entries relating to the subject in dispute.^e

SEC. IV. PROCEEDINGS TO COMPEL THE PRODUCTION OF BOOKS, PAPERS, ETC.

In the trial of actions at law, the court are authorized, by statute,^f on motion, and on ten days notice thereof, to order the parties to produce books and writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same, by the ordinary rules of proceedings in chancery;^g and if the plaintiff fail to comply with such order, judgment of non-suit may be rendered against him; and if the defendant fail to comply with a like order, judgment may be rendered against him by default.

Form of Notice to produce Books, &c.

A. B. }
v. } In Assumpsit. ——— Com. Pleas.
C. D. }

The said C. D. will take notice, that on the — day of — next, at 10 o'clock in the morning, or as soon thereafter as counsel can be heard, application will be made to the court, by the said A. B., for an order upon the said C. D. to produce, on the trial of this cause, the following books, [*&c. description,*] in the possession or power of the said C. D., and which contain evidence pertinent to the issue in this cause.

Dated, &c.

A. B.

Affidavit of Service of Notice.

T. S. of, &c., makes oath and says, that on the — day of —, A. D. —, [*at least ten days before the application,*] he served the *within* Notice upon

(q) *Stra.* 1203. See 1 T. R. 689; 8 *Id.* 590;
3 *Id.* 903.

(r) 6 *Cowen* 6219 *Johas.* 233.

(s) 1 *Arch. Pr.* 164.

(t) *Stra.* 1005, 1223; 3 T. R. 308.

(u) *Swan's Stat.* 676, sec. 113.

(v) See 1 *Swanston*, 114, 535; 7 *Cond. E.*
Ch. Rep. 470; 5 *Paige*, 548; 2 *Paige*, 369,
494.

 Bill of Particulars, &c., of the Defendant.

the *within* named C. D., by delivering to him in person a true copy thereof, at —.

T. S.

Sworn to, &c.

Order to produce Books and Writings.

A. B. }
 v. } In Assumpsit.
 C. D. }

A. B., by Mr. O. his counsel, this day moved the court for an order upon C. D. to produce, upon the trial of this cause, the following [*books, &c.*] and it appearing to the court that due notice of this motion had been given to the said C. D., it is thereupon ordered, that the said C. D. do produce, in open court, on the trial of this cause, the said *books, &c.*, then and there to be inspected, and otherwise used as the court shall direct.

If the books, &c., are not in the possession of the party, his affidavit to that effect may be required; which may be in the form following:

A. B. }
 v. } In Case.
 C. D. }

The said C. D. makes oath and says, that the *books, &c.*, specified in the order in this cause on — last, for their production, are not now, and at the time notice to produce the same was served upon him, were not, and never since have been, any, or all, or either of them, in the possession of the said C. D., or in any manner whatever within his power, or under his control.

C. D.

Sworn to, &c.

SEC. V. BILL OF PARTICULARS, AND COPIES.

The proceedings by a defendant to procure a bill of particulars of the plaintiff's claim, and copies of written instruments which he intends to offer in evidence, have already been mentioned.^a

The statute also provides that the defendant, or his attorney, if required, shall deliver to the plaintiff or his attorney, a copy of any deed or instrument of writing, of which, in his plea, he shall make profert; or a copy of any bill, bond, deed, note, receipt, bargain, contract, instrument of writing, or bill of particulars of any account or demand, which he intends to offer in evidence at the trial.^b

The notice to the defendant, and his bill of particulars, can be readily made out from the forms already given for the plaintiff.^a

(a) See ante, p. 615 to 618.

(b) Swan's Stat. 670; see the Statute, ante 615, n. (b).

Depositions — In what cases and before whom taken — Notice.

The effect of not furnishing a bill of particulars or copies, has already been stated.^c

SEC. VI. DEPOSITIONS.

1. *In what cases Depositions may be taken.*

If a witness resides out of the county where the cause is pending, or intends to leave the county before the time of trial, or is ancient or very infirm, his deposition may be taken.^d

2. *Before whom Depositions may be taken.*

The deposition may be taken before any justice, or judge of any court of the United States, or before any chancellor, master commissioner in chancery, justice or judge of any supreme or superior court, notary public, mayor or chief magistrate of any city or town corporate, judge of any county court, or court of common pleas, or justice of the peace of this State, or of any of the United States, or any district or territory thereof; such officer not being of counsel or attorney to either of the parties, or otherwise interested in the event of such cause.^e

So, commissioners in other States, appointed by the Governor, may take depositions.^f

3. *The Notice, and its Service.*

Before a deposition can be taken, proper notice must be given to the adverse party, which may be in the form following:

A. B. }
 v. }
 C. D. } Com. Pleas, ——— county.

Depositions will be taken in this case, by the *plaintiff*, at ———, in the town of ———, county of ——— and State of ———, on the ——— day of ——— *next*, between *six*, A. M., and *nine*, P. M. of the clock.

A. B.

Dated, *July 5*, 1850.

This notice must be served on the adverse party, his agent or attorney of

(c) Ante, p. 618.

(d) Stat. 321, § 1.

(e) Stat. 321, § 1.

(f) 42 vol. Stat. 5.

Depositions — Service of Notice — Subpœna.

record, or left at his usual place of abode, at such time as will enable the adverse party to attend at the taking of the depositions, by traveling at the rate of twenty miles per day, Sundays exclusive.⁵

When the parties reside less than twenty miles from each other, as for instance, in the same town, the notice cannot be given on the day the depositions are taken, but must be given at least the day previous.⁶ So, if the parties reside twenty-one miles apart, two days' notice must be given at least; so that, if depositions are to be taken on the third, notice must be served on the first. In calculating the days, the day of service is included, and the day of taking the depositions is excluded. Therefore, if two days' notice is required, and depositions are to be taken on Wednesday, notice must be served on Monday.

Service of this notice may be made by any disinterested person, and proof of such service may, in general, be required, before the deposition can be read.

The service of the notice cannot be proved by the party to the suit.¹

4. *How the attendance of Witnesses before the Officer may be enforced.*

The attendance of witnesses before the officer, may be enforced by subpœna and attachment.²

Form of Subpœna for Witnesses.

The State of Ohio, ——— county, ss.

To the Sheriff¹ of said county, Greeting:

You are hereby commanded to summon F. W., to be and appear before me, G. H., a [*here describe official character*] at ———, on the ——— day of ———, at nine o'clock, A. M., then and there to be examined, and the truth to speak, in behalf of the *plaintiff*, in a certain cause pending in the court of ———, wherein A. B. is plaintiff, and C. D. is defendant: Hereof fail not, under the penalty of the law, and have you then and there this writ.

Given under my hand and seal, this ——— day of ———, A. D. 18——.

G. H., [Seal.]

If a witness, without any reasonable excuse, neglects or refuses to appear, according to the command of the subpœna, an attachment may issue.³

(g) Stat. 321, § 2.

(i) 10 Ohio Rep. 397.

(h) Wright's Rep. 672.

(j) Stat. 322, § 6, 7.

(k) Id. 322, § 7.

(1) The subpœna may be directed to any sheriff or constable; Stat. 323, § 12.

Depositions—Process, &c., against Witness.

Form of Attachment for a Witness.

The State of Ohio, ——— county, ss.

To the Sheriff of ——— county; [*or, say, To any Constable of the Township of ———, in said ——— county,*] Greeting:

Whereas, in a certain suit pending in [*here state the court and county where the suit is pending*] wherein A. B. is plaintiff, and C. D. is defendant, one E. F. was duly subpoenaed as a witness, to appear before me, G. H., [*here describe the official character of the officer who issues the attachment, on, [&c.,] at, [&c., time and place required by the subpoena for the appearance of the witness,*] to testify in said cause, that his deposition might be taken, and the said E. F. hath disobeyed said subpoena: Now, therefore, in the name of the State of Ohio, you are hereby commanded to attach the said E. F., so as to have his body, forthwith, before me, the undersigned, to answer the State of Ohio for said contempt by him committed, as is alleged, in disobeying said subpoena; and of this writ, also, make due return forthwith.

Given under my hand and seal, this ——— day of ———, A. D. ———.

G. H., [Seal.]

RETURN: I have the body of the within named E. F.

[Date.]

R. S., Sheriff of ——— county.

Fees: [The fees are the same as for like services in other cases.]

A witness, however, on being subpoenaed may, as in other cases, demand his pay, (the fees for a day,) and if refused, he need not attend; and so, from day to day, he may require his fees, and if refused, he need not remain at his own expense, and such refusal will be a sufficient answer to an attachment. But if he does not demand his fees, the omission to pay them will not exonerate the witness. An attachment will not, in general, issue without *personal service* upon the witness.

If a witness have no reasonable excuse for his neglect to obey the subpoena, he may be fined in any sum not exceeding fifty dollars, for the use of the party for whom he was subpoenaed, together with costs.

When a witness refuses to answer such questions as he is bound to answer, the officer may fine him in any sum not exceeding fifty, nor less than five dollars, for the use of the party for whom he was subpoenaed; or commit him to the jail of the county, there to remain until he shall submit to testify.

Form of Mittimus for the commitment of a Witness.

The State of Ohio, ——— Township, ——— County, ss.

To the Keeper of the Jail of the County aforesaid, Greeting:

Whereas, on the ——— day of ———, in the year ———, in a suit then pending

Depositions — Oath to, and Examination of, Witnesses.

in [*here state the court and county where the suit is pending,*] wherein A. B. is plaintiff, and C. D. is defendant, one E. F. was duly subpoenaed, at the instance of A. B., to appear before me, G. H., [a justice of the peace in and for said township and county,] at, [*here state the place and time, where and when, the subpoena directed the witness to appear,*] to testify in said cause before me, that his deposition might be taken. The said E. F. accordingly then and there appeared, and though not incompetent to testify in said cause, nor otherwise protected by law from testifying, he then and there refused to testify: Whereupon it was ordered and adjudged by me, that said E. F. be committed to the jail of said county, there to remain until he shall submit to testify in the premises.

You are therefore, in the name of the State of Ohio, hereby commanded to receive the said E. F. into your custody, in the jail of the county aforesaid, there to remain until he shall submit to testify as aforesaid.

Given under my hand and seal, this — day of —, A. D. 18—.

G. H., J. P. [Seal.]

5. *Form of oath to Witnesses, and form and requisites of Depositions, and how transmitted, &c.*

The officer, at the time and place mentioned in the notice for taking the depositions, will administer to the witnesses an oath in the form following:

You [*if there be more than one, say,* You and each of you,] do solemnly swear in the presence of Almighty God, the searcher of all hearts, [*or if the witness do not swear by the uplifted hand, upon the Holy Evangelists of Almighty God,*] that you will testify the truth, the whole truth, and nothing but the truth, in the cause now pending before [*here mention the court before which the suit is pending,*] wherein A. B. is plaintiff, and C. D. is defendant, as you will answer to God.

If the witness affirm, the form of the affirmation may be as follows:

You do solemnly and sincerely declare and affirm, that you will testify the truth, the whole truth, and nothing but the truth, in the cause now pending before [*here mention the court or justice before whom the suit is pending,*] wherein A. B. is plaintiff, and C. D. is defendant; and this you do under the pains and penalties of perjury.

The witness must state his whole story and all he knows, and the justice or officer taking the deposition, must note it down as nearly in the words of the witness as possible, so as, at the same time, to make it intelligible.

When an objection is made, on the trial of the cause, to the competency of a witness, or the relevancy of the testimony, the justice immediately decides the question, and sustains or overrules the objection. But when taking a deposi-

Form of Depositions.

tion he can exercise no such power. He must, in general, receive and note down in the deposition, the answers to questions asked by one party, if he insist upon it, whether the other party object or not to the propriety or relevancy of the testimony.

The officer will write out the deposition in the form following :

Form of Depositions.

Depositions of witnesses taken in a cause pending in the court of [*here insert the name of the court or justice before whom the suit is pending.*] wherein A. B. is plaintiff, and C. D. is defendant, and for said plaintiff, [*or defendant, as the case may be.*] in pursuance of the notice hereto attached, and at the time and place therein mentioned. [*Here state which of the parties, or their agents, was present.*

W. S., of the county of —, of lawful age, being first duly sworn, [*or affirmed,*] by me, as hereafter certified, deposes as follows :

Question—

Answer—[*Here insert as nearly in the words of the witness as possible, (so as at the same time to be intelligible,) the testimony of the witness. If any questions are asked of the witness by the party against whom the testimony is to be used, say,*] Upon cross-examination by the defendant, [*or plaintiff, as the case may be,*] the said W. S. further says: [*Here insert the testimony upon the cross-examination.*

[*If any paper is referred to by the witness it should be marked by a letter, thus: "A," and annexed to the deposition; and the witness can refer to and identify it as the "paper hereto annexed, marked A."*]

After the testimony of the witness has been written down, it should be then carefully read to him, and corrected as he may desire. The witness will then sign his name at the end of his deposition.

If there are two or more witnesses, the officer will commence the next deposition immediately below the first, in the form following :

Also, T. S., of —, and of lawful age, being first duly sworn, [*or affirmed,*] as hereafter certified, deposes as follows :

Question—

Answer—[*Here insert the testimony as heretofore directed, and then the witness will sign his name to his deposition.*

Each witness having subscribed his own deposition, the officer will, in all cases, annex at the end of the whole his certificate, which must be in the form following :

I, G. H., [a justice of the peace in and for the township of —, in the county of —, Ohio,] do hereby certify, that the above named [*here insert the names of all the witnesses*] were by me first duly sworn, [*or affirmed,*] to

Authentication of Depositions.

testify the truth, the whole truth, and nothing but the truth, and that the foregoing depositions, by them respectively subscribed, were reduced to writing by me, [or if reduced to writing by any other person, here name the person,] and were taken at the time and place specified in the inclosed notice.

In testimony whereof, I have hereunto set my hand [and official seal,] this — day of —, in the year —.

(Signed)

G. H., [Seal.]

It is said to have been decided in one of the circuits of the Court of Common Pleas in this State, that the officer should indorse on the envelope of the depositions, the following words: "Sealed up and addressed by me," and sign his name thereto.

If the depositions are to be used within the limits of the judicial circuit of the Court of Common Pleas wherein they are taken, no further act of authentication is necessary than the above certificate; but the officer taking the same, will deliver them into the office of the proper clerk, or other proper officer; or will seal them up with a copy of the notice, direct and transmit them to such clerk or other officer, there to remain under seal until opened according to the rules of court. If, however, the depositions are not taken within the judicial circuit in which they are to be used, and are taken by an officer having no seal of office, whether taken in this State or elsewhere, they must be further authenticated, either by parol proof, adduced in open court, or by the annexation of the official certificate and seal of some secretary or other officer of State, keeping the great seal of the State, or the clerk or prothonotary of the court of some city, county, circuit, district, state, territory, province, or other division, that the justice or other officer, by whom the depositions were taken, was, at the time of taking the same, a justice of the peace, or an officer, within the meaning of the statute. But if the officer before whom depositions are taken, whether residing in this State or elsewhere, have a seal of office, they require no further authentication than the certificate and signature of such officer, (in the form given above,) with his seal of office thereto annexed.

A justice of the peace has no *official* seal; and, consequently, a deposition taken before a magistrate who resides out of the judicial circuit where it is to be used, cannot be received in evidence without the further certificate of the clerk, prothonotary, or secretary, as above mentioned. If taken before a justice within the judicial circuit, his certificate will be sufficient, without any further authentication.

Certificate of the County Clerk.

The State of Ohio, — County, ss. I, A. B., Clerk of the Court of Common Pleas, within and for the county of —, do hereby certify that [SEAL.] on the — day of —, G. H. was a justice of the peace within and for the said county of —, duly elected, commissioned and qualified.

Given under my hand and seal of office, this — day of — A. D. —.

A. B., Clerk.

6. *Filing Depositions.*

The period immediately before the trial term within which depositions should be filed, is regulated by the rules of practice of the several circuits. In the absence of any rule upon this subject, depositions in actions at law, may probably be filed at any time before trial; but if filed during the trial term, it is proper to give the adverse party notice thereof, so that he may have an opportunity to file exceptions.

7. *Opening of Depositions.*

The Statute provides^m that the depositions shall remain under seal until opened according to the rules prescribed by the court to which they are transmitted.

In the supreme court they may be opened in the clerk's office, by the clerk, at the request of either party, or his counsel.ⁿ The clerk, in such case, indorses upon the depositions, upon what day, and at whose request they were opened, and they remain on file for the inspection of either party.^o

In most of the circuits the courts of common pleas have adopted a rule for the opening of depositions, similar to that of the supreme court, above mentioned. In the absence, however, of any rule upon the subject, the depositions are not opened, except by consent of both parties or their counsel, until the court is in session. If opened by consent, the clerk indorses that fact upon the envelope, or consent is indorsed over the signature of the counsel.

8. *Exceptions to Depositions.*

A deposition cannot be received in evidence in a cause,

1st, Unless the notice required by law was served on the opposite party in the manner and within the time heretofore mentioned. If, however, the opposite party, by himself or agent, was present at the taking of the deposition and cross-examined the witnesses, he cannot, in general, object to the want of notice.

2d, Unless the deposition appears to have been taken at the time and place mentioned in the notice. But the opposite party cannot, in general, object to any defect as to the time and place, if he or his agent was present when the deposition was taken, and cross-examined the witness.

3d, Unless the notice under which the deposition was taken is inclosed and returned with the deposition.^p But this objection is also, in general, waived, if the opposite party appeared and cross-examined the witness.

4th, Unless it appear from the certificate of the justice or officer taking the

(m) Stat. 322, sec. 4.

(n) Rule of Court, ante, 7.

(o) Rule of Court, id.

(p) Wrights' Rep. 632.

 Exceptions to Depositions — Depositions on Appeal.

deposition, that the witnesses were sworn or affirmed to testify to the truth, the whole truth, and nothing but the truth.⁴ The object of the statute is, that the witness shall be first sworn and then relate his whole story and all he knows.

5th, Unless it appear from the deposition, or certificate of the officer, that he or some other person named in the deposition, reduced it to writing.

6th, Unless authenticated by the certificate of the clerk, or secretary, &c., as above mentioned, if taken out of the judicial circuit of the common pleas in which it is to be used. If, however, as has already been repeated, a deposition be taken within such judicial circuit, or if it be taken by an officer out of such circuit, who has a seal of office, no certificate, except that of the officer taking it, (with his seal annexed, if he have a seal,) is required.

The rule of the supreme court is generally adopted in the courts of common pleas, that no exceptions, for other causes than the competency of the witness, or the competency or relevancy of the testimony will be heard, unless made in writing, and notice thereof given to the opposite counsel, before the cause is called for trial.⁵ And when depositions are in the supreme court prior to the continuance of a cause, no exceptions can be taken to such depositions unless the same be filed with the depositions in the clerk's office, and notice thereof in writing be given to the adverse party or his counsel, within six months from such continuance, except for incompetency or irrelevancy.⁶ The rules of the courts of common pleas in the various circuits are not uniform as to the effect of omitting to file exceptions to depositions which were on file previous to the continuance of the cause; but, in general, it is a waiver of all exceptions, except for incompetency or irrelevancy.

The exceptions are generally indorsed upon the depositions, thus :

The plaintiff [*or, defendant,*] excepts to these depositions because,

1st, [*stating the causes of exception.*]

J. S., Attorney for ———.

[Date.]

9. *In what cases depositions used on the trial below may be used on appeal.*

The statute provides that depositions having been taken and admitted in evidence upon the trial below, may on appeal, be read in evidence, on the trial of the same action, cause, or other matter, in the court to which such appeal may be taken; subject, however, to all such legal exceptions as may be taken thereto: provided, that such depositions shall be filed with the clerk of the court to which such appeal may be taken, on or before the second day of the term of the said court, next succeeding the time of taking such appeal.⁷

(q) Wrights' Rep. 380, 746, 747.

(r) Rule of Supreme Court, ante, p. 7.

(s) Rule of Supreme Court, *ub. supra*.

(t) Stat. 323, sec. 10.

*Dedimus Potestatum.*10. *Dedimus Potestatum.*"

1. *In what cases granted.* A *Dedimus*, or commission to take depositions, according to common usage, may be granted either by the supreme court, or court of common pleas, in term time, or by any president judge, in vacation."

Order of Court for a Dedimus Potestatum.

On motion to the court, by Mr. O., counsel for the plaintiff, It is ordered, that a *dedimus potestatum* issue in this cause, to take the depositions of sundry persons in the city of —, to be directed to S, T. and W., any two of whom may execute the same; and it is further ordered, that the defendant, within ten days, file with the clerk of this court the name of an agent resident in the said city of —, to whom notice of the time and place of executing said *dedimus potestatum* may be given; and it is further ordered, that the service of such notice upon such agent, ten days previous to the execution of said *dedimus potestatum*, shall be deemed good service upon the defendant; and it is further ordered, that if the defendant fail to file with the clerk the name of such agent, by the time aforesaid, then said *dedimus potestatum* may issue *ex parte*."

Notice of Application to a President Judge for a Dedimus.

A. B. }
vs. } In Case. ——— Common Pleas.
C. D. }

The defendant will take notice, that on — next, at —, at ten o'clock in the morning, or as soon thereafter as counsel can be heard, the plaintiff will apply to J. S., President Judge of — circuit, for a *dedimus* to take depositions in this cause, at —.

(Signed) A. B.

Dated, &c.

Order for a Dedimus by President Judge.

A. B. }
vs. } In Case. ——— Common Pleas.
C. D. }

On application of the said A. B., it is ordered, [&c., the same as if ordered by the court.

J. S., President Judge of — circuit.

(u) The mode of proceeding and the forms, &c., relating to a *Dedimus Potestatum*, are taken from Wil. Prac. 348.

(v) Swan's Stat. 670, sec. 91.

(w) The Commissioners are appointed by the court, or agreed on by the parties. In England, the order of the court directs the clerk of the adverse party, to name to the clerk of the party

applying for the commission, an agent resident in the place where the commission is to be executed, to whom notice of the execution of the commission is to be given, and that service of such notice on the agent be good notice, or in default of naming an agent, the commission to issue *ex parte*; New. Ch. Pr. 120. Depositions taken upon commission are not governed by the

*Dedimus Potestatum.**Form of Dedimus Potestatum to take Depositions, on notice.*

[SEAL.] The State of Ohio,

To S. T. and W., of, &c., *Greeting:*

Know ye, that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give to you or any two of you, full power and authority to examine and take the depositions of witnesses in a certain cause depending in our *Court of Common Pleas*, within and for the county of —, wherein A. B. is plaintiff and C. D. defendant;* and therefore we command you, or any two of you, that at certain days and places to be appointed by you, or any two of you, the said parties or their agents having *ten* days notice thereof, you cause such witnesses as may be required by the said plaintiff, [*or, by either of said parties or their agents,*] to be brought before you or any two of you, and then and there examine each of them on their respective corporal oaths, (or affirmations,) first taken before you, or any two of you, and that you reduce such examination to writing, and return the same, together with this writ, closed up under your seals, or the seals of any two of you, into our said court, with all convenient speed.

Witness, T. C., clerk of our said court of common pleas, at C., this — day of —, A. D. —.

T. C., Clerk.

Form of Dedimus Potestatum to take Depositions; ex parte.

*Proceed as in the last precedent to the **] — on the part of the *plaintiff*, and therefore we command you, or any two of you, that at certain days and places to be appointed by you, you cause such witnesses, as may be required by the said *plaintiff*, to be brought before you or any two of you, [*&c., conclude as in the last precedent.*]

To prevent mistakes in the execution of the commission, it is customary to transmit special instructions: Thus —

Instructions to Commissioners.

Columbus, Ohio, Jan. 1, 1850.

GENTLEMEN — Inclosed is a commission issued by the court of — authorizing you, or any two of you, to examine witnesses in a certain cause pending in said court. In the execution of this commission you will please observe the following directions:

statute providing for the taking of the depositions, but by the "common usages of the courts;" Swan's Stat. 670, sec. 91. The application may be made at Law as well as in Equity; and being addressed to the discretion of the court, the parties are put under such terms as will afford a

convenient opportunity for them to attend in person, or by agent, and at the same time allow the applicant to proceed *ex parte*, if the opposite party refuses to comply with the order of the court.

Dedimus Potestatem.

You will draw up on paper, preparatory to the examination of the witnesses, the title of the depositions, thus: "Depositions of witnesses, produced, sworn and affirmed on the — day of — A. D. — at —, by virtue of a commission issued from the court of —, to us directed, for the examination of witnesses in a certain cause pending in said court, wherein A. B. is plaintiff and C. D. defendant.

You will next administer to the witness whom you are about to examine, on *oath* or *affirmation*, that without favor or affection to either party, he will speak the truth, the whole truth, and nothing but the truth, and then proceed as follows:

"G. T., of, &c., aged — years or thereabouts, being produced, sworn [*or, affirmed,*] and examined on behalf of the plaintiff [*or, defendant,*] deposes and says, that," &c. After the examination in chief is concluded, if there be a cross-examination, say, "Upon cross-examination by the defendant [*or, plaintiff,*] the said G. T. further says that," &c. If the witness be re-examined by the party calling him, say, "Upon re-examination by the plaintiff [*or, defendant,*] the said G. T. further says, that, &c.

The witness will then subscribe his examination with his name, and the Acting Commissioners will put their names opposite to his signature for the purpose of identifying it; and if in the course of the examination, the witness refers to any paper, or document, it must be marked by some letter or figure, and further identified by the acting commissioners, thus: "This is the paper referred to by — in his examination, as the paper marked (A)," to which they will sign their names.

The examination being completed, the commissioners who conducted it will attach the depositions and exhibits to the commission, and indorse the same as follows: "The execution of this commission appears in a certain schedule hereto annexed," to which the names of the commissioners will be subscribed. The whole, thus prepared, will be enclosed in an envelope, sealed up, and addressed as follows: "To," &c., [*the court from which the commission issued.*] It may then be delivered to an agent, or forwarded by mail, or other expeditious and safe conveyance.*

Very Respectfully,

Your obedient servant.

A. B,
C. D, and } Esq's., Commissioners.
E. F.

(x) It is often advisable to take the deposition of the person serving the notice, (*if notice be given,*) to prove the service of such notice, especially if the person serving the notice resides abroad. In England, and in some of the United States, witnesses are examined upon written

interrogatories, prepared by counsel, and annexed to the commission. This practice does not prevail to any considerable extent in Ohio. The examination is generally *exa voce* and the testimony reduced to writing by the commissioners, in the language of the witness.

Subpœna and Service.

SEC. VII. SUBPœNA AND ATTENDANCE OF WITNESSES.

1. *The Præcipe for, and Form of a Common Subpœna.*

The party requiring the attendance of witnesses, must file with the clerk of the court a præcipe,* which may be in the form following:

Common Form of Præcipe for Witnesses.

A. B. }
v. } ——— Common Pleas.
C. D. }

Please issue subpœna for the following witnesses in behalf of [plaintiff, or defendant, as the case may be,] to wit: R. S., [&c.]

J. S., Att'y for [Pl'tiff, or Def't.]

To Clerk.

[Date.]

Form of Subpœna for Witnesses.

The State of Ohio, ——— county, ss.:

[SEAL.] To R. S., [&c., naming the witnesses :'] We command and strictly enjoin you, and each of you, that, laying aside all manner of businesses and excuses whatsoever, you, and each of you, be and appear in your proper persons before the Honorable the Judges of our *Court of Common Pleas*, within and for the said county of ———, at the court house in said county, on the *fifth* day of March next, [the day the cause is set for trial,'] at nine o'clock, forenoon, then and there to testify what you and each of you may know, in a certain action in said court pending, wherein A. B. is plaintiff, and C. D., is defendant: * and this do you, under the penalty of the law. Witness, C. C., clerk of said court, this ——— day of ———, A. D. ———.

C. C., Clerk.

2. *Service of Subpœna and return thereto.*

The subpœna may be served by the sheriff or any disinterested person.^a

The subpœna may be served by reading the original to the witness, but he will be entitled to a copy if he request it. The usual mode of service is by

(x) Stat. 651, §19.

(y) The names of all the witnesses required by the præcipe to be issued must be included in one subpœna, unless the præcipe otherwise direct; Statute, 651, section 19; and if the clerk, for the purpose of increasing his fees, issues more than one subpœna, the court, on

motion, will not only limit his fees to the cost of one subpœna, but order him to pay all costs which may have accrued to the sheriff or otherwise, by the issuing and service of more than one subpœna.

(z) Stat. 674, §107.

(a) Stat. 651, §19.

Return to Subpœna — Subpœna Duces Tecum.

showing the witness the original and giving him a copy. An attachment against a witness for disobeying a subpœna, will not be granted by the court, unless they are satisfied that the subpœna has come to the hands of the witness within a reasonable time before the day mentioned in it for his attendance.

Return to Subpœna by the Sheriff.

Personally served July —, A. D. —, [or if some of the witnesses only have been served, say, Personally served July —, A. D. —, on the within named R. S.; the within named L. M. not found.]

S. S., Sheriff — county,
By S. L., his Deputy.

Fees:

Return to Subpœna by other person than Sheriff.^b

The State of Ohio, — county, ss.:

M. M. being duly sworn, saith, that on the — day of —, A. D. —, he personally served this writ on the within named R. S., by reading the same to him, [or say, by delivering to him a true copy thereof, and at the same time showing him the original, according to the facts,] and that the writ was duly returned to the clerk's office, by affiant, on the — day of —, A. D. —.

M. M.

Sworn to, [&c., jurat.]

3. *Subpœna duces tecum.*

If a person who is not a party to the cause, have in his possession any written instrument, &c., which could be evidence for either party at the trial, instead of the common subpœna, a subpœna duces tecum should be served upon him, commanding him to bring with him, and produce at the trial, the instrument named.

By this writ the witness is compellable to produce all documents in his possession, unless he have a lawful or reasonable excuse to the contrary. Of the validity of the excuse, the court, and not the witness, is to judge.^c A witness, however, cannot be compelled to produce a paper which will criminate himself.^d

In general, a witness may be compelled to produce a document, although the production of it will adversely affect his pecuniary interest,^e that is, might establish, or tend to establish, against him, the fact of his being in debt, or might subject him to a civil action.^f But the court will, notwithstanding,

(b) Stat. 651, § 9.

(c) 10 Pick. 9; 9 East, 473.

(d) 3 Burr. 1087; 6 Pet. 367; 2 Taunt. 115.

(e) 10 Pick. 9.

(f) 1 Phil. Ev. 436; 10 Pick. 9; 4 Dees. 446. See 1 Stark. Ev. 88. The rule in the text seems to be the proper one, provided a witness is bound to give oral testimony, which may

Subpœna Duces Tecum.

exercise a discretion, and excuse the production of a document, where the party, at whose instance the subpœna is issued, will acquire an inequitable and unfair advantage over the witness by obtaining the document as an instrument of evidence. Thus, in an action upon a promissory note, a witness served by the plaintiff with a subpœna duces tecum, to produce the note, testified that the defendant, a mechanic, assigned his property to the witness, who was a creditor, and that the plaintiff and other creditors put their demands, including the note in question, into the hands of the witness for collection, under an agreement that he might furnish stock to the defendant to work up for the benefit of the creditors, and that the proceeds of all the property should be applied, first, to the re-payment of the advances made by the witness, and the surplus to the payment of the demands, and that a large sum was due to the witness on account of his advances; it was held that the witness was not bound to produce the note for the purpose of sustaining the action.¹

This writ cannot be issued to a public officer, such as the recorder, or auditor of the county, or a justice of the peace, to bring original papers into court, when certified copies would be evidence.² So, the clerk, cashier or other servant of a close corporation, is not bound to produce the books of the latter, even in a case where the corporation is a party to the suit;³ for such servant has no property in, or right to the possession of the books of the corporation. The proper practice in such case is, if the corporation is a party to the suit, to give notice to produce the books, &c.⁴

An attorney, to whom a document has been professionally entrusted by a client, cannot be compelled, under this writ, to produce it on the trial of the cause; but may be compelled to produce it, upon any other trial between third persons, if the client could have been compelled, under a subpœna duces tecum, to produce it, had it remained in his possession, but not otherwise.⁵

Præcipe for a Subpœna Duces Tecum.

A. B. }
v. } Com. Pleas, — County.
C. D. }

Please issue a subpœna duces tecum in behalf of [*plaintiff*.] for R. S., requiring the said R. S. to search for and bring with him a certain [*paper, writing, or deed, or agreement, or book, as it may be,*] purporting to be [*hers*

subject him to a civil action, or a pecuniary loss, or charge him with a debt. That a witness is bound to give oral testimony in such case, seems to be well settled in this country. See 1 Greenl. Ev. 503, 504, and cases there cited. It is, however, stated in Starkie's Ev. 88, that "it seems a witness is not compellable to produce title deeds, or other documents, which belong to him, where the production might prejudice his civil rights;" and some of the English cases seem to justify

this remark. See 10 Eng. C. L. Rep. 227; 8 Id. 314; 8 Id. 72; 4 Esp. C. 43.

(f) 10 Pick. 9. (g) 1 Yeates, 403.

(h) 5 Cowen, 153, 419; 3 Met. 282.

(i) See ante, p. 867 to 869.

(j) See 2 Cowen & Hills notes to Phil. Ev. 1173, 276, 277. In the case of John v. John, Wright's Rep. 584, the attorney was compelled to testify as to the contents of a note professionally entrusted to him in the cause then on trial. But quere. See 4 Wend. 558; 4 Verm. 612.

Subpœna Duces Tecum — Attachment against Witness.

describe the instrument or book as near as may be, with the date, &c. if practicable.]

To Clerk.

J. S., Att'y for [Plaintiff or Defendant.]

[Date.]

Form of Subpœna Duces Tecum.

The State of Ohio, — County, ss.

[SEAL.] To R. S :

We command and strictly enjoin you, that laying aside all manner of businesses and excuses whatsoever, you appear in your proper person before the Honorable, the Judges of the court of *Common Pleas*, within and for said county of —, at the court-house in said county, on, [*&c., the day the cause is set for trial,*] at nine o'clock forenoon, to testify what you do know in a certain action in said court pending, wherein A. B. is plaintiff and C. D. is defendant; and that you also diligently and carefully search for, examine and enquire after, and bring with you and produce at the time and place aforesaid, a certain [paper, writing, or deed, or agreement, or book, &c. *as the case may be, and describing the same as in the præcipe,*] together with all copies, drafts and vouchers, relating to the said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said cause; and this do you under the penalty of the law. Witness C. C., clerk of said court, this — day of —, A. D. —.

If a common subpœna for other witnesses is included in the præcipe for a subpœna duces tecum, then insert all the names mentioned in the præcipe, as in the form ante, p. 882, and at the asterisk in that form insert the duces tecum clause as in the preceding form, thus: "And that you, the above named R. S., diligently and carefully search for," [*&c. as in preceding form, and following the same to the end.*]

4. Attachment against a Witness for disobeying a Subpœna, with Forms.

If a witness has been duly summoned, and he wilfully neglects to appear, he is guilty of a contempt of the process of the court, and may be proceeded against by attachment.

An attachment does not proceed upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the court.²

In practice, the motion for an attachment is granted upon the witness failing to answer when called, and upon the court ascertaining, by the return upon the subpœna, that the witness was duly served.

A more formal mode, however, is to file affidavits, showing that the subpœna was seasonably and personally served on the witness, and that every thing was done which was necessary to call for his attendance.

Attachment against a Witness.

In England, and in most of the states of the Union, it is necessary to show by affidavit that the fees of the witness were paid or tendered, or the tender expressly waived.¹ And in this state, if the witness demanded his fees and they were not paid, he is not bound to obey the subpoena; and, consequently, no attachment can issue in such case; or if issued, the court will dismiss it at the costs of the party that moved the attachment.

The attachment is in the form following:

Form of Attachment against a Witness.

The State of Ohio, — County, ss.

[SEAL.] To the Sheriff of said County, Greeting:

We command you, that you attach R. S. so as to have his body before our Court of Common Pleas within and for said county of —, [forthwith or on the first day of our next term,] to answer us of a certain contempt, by him lately committed against us, by not appearing as a witness in behalf of A. B., having been duly summoned, as is alleged, and further to do and receive what our said court shall in that behalf consider: hereof fail not, and have you then and there this writ.

Witness C. C., clerk of said court, this — day of — A. D. —.

C. C., Clerk.

Upon the return of the writ the charge against the witness is drawn up in writing by the prosecuting attorney, to which is annexed interrogatories. The interrogatories are answered under oath by the witness, or the witness, upon waiving the written charge and interrogatories, is examined under oath in open court, touching his excuse for not obeying the subpoena, and the court may punish the contempt by fine or imprisonment, or both.^m

The journal entries in such cases are usually two, in the following form:

Motion and Order for an Attachment against a Witness.

A. B. }
v. }
C. D. }

On motion of Mr. A. it is ordered that an attachment issue against R. S. for a certain contempt by him lately committed against the state of Ohio, by not appearing as a witness in behalf of the said A. B., having been duly summoned as is alleged.

The State of Ohio

v.

R. S. [the name of the witness.]

} In Attachment for Contempt.

This day came the prosecuting attorney on behalf of the State, and the said R. S., in his own proper person, to answer for a certain contempt alleged

(l) Tidd. 807, 808; 1 Phil. Ev. (Cowen & Hills,) 786. See ante 549, note.

(m) Stat. 211, sec. 1.

Habeas Corpus ad Testificandum.

against him by disobeying a subpoena duly issued by this court in behalf of A. B., and served on the said R. S., [*if a charge in writing and interrogatories have been filed proceed as follows:*] which charge having been stated by the State in writing, and filed, and the said R. S. heard in his defence, [*or if the witness waived a charge in writing say:* and the said R. S. having waived a statement of the said charge in writing, and being examined and heard in the said premises,] it is considered by the court that he be discharged and go acquit, or he is guilty of disobeying said subpoena, and of a contempt of the court and state in the premises, and that he pay a fine of — dollars, [*&c., stating the sentence of the court.*]

5. *Habeas Corpus ad testificandum.*

If a witness is in custody, or is in the military or naval service, and is therefore not at liberty to attend, without leave of his superior officer, which he cannot obtain, he may be brought into court by this writ. It is granted at discretion, on motion in open court. The application is made in civil cases upon affidavit, stating the nature of the suit, and the materiality of the testimony as the party is advised by his counsel and verily believes, together with the general circumstances of restraint which render the writ necessary; and if the witness is not actually a prisoner, and has not been served with a common subpoena, the affidavit should also state his willingness to attend. The writ is left with the sheriff, if the witness is in custody; but if he is in the military or naval service, it is left with the officer in immediate command, to be served, obeyed and returned, like any other writ of habeas corpus.

It is usual, in practice, where a witness is in the custody of the sheriff of the county in which the cause is tried, for the court, on motion, to order the sheriff to bring in the witness without any affidavit being filed or writ being issued for that purpose. The clerk enters the order on the journal thus:

A. B. }
v. }
C. D. }

On motion of M. A., attorney for the *plaintiff*, the sheriff is ordered to bring before the court R. S., a prisoner in his custody, to testify in behalf of the plaintiff in this cause, and after he has testified, return him to the prison.

Form of Affidavit for a Habeas Corpus ad testificandum.

A. B. }
v. } Common Pleas. — county, ss.
C. D. }

A. B., the above named plaintiff, maketh oath and saith, that R. S., now a prisoner for debt, [*or other cause of imprisonment,*] in custody of the sheriff

Habeas Corpus ad Testificandum.

of said county, is, and will be, a material witness for this deponent, on the trial of this cause, (which is an action of *assumpsit*,) as he is advised by counsel and verily believes. And this deponent further saith, that he is advised by counsel and verily believes that he cannot safely proceed to the trial thereof, without the testimony of the said R. S., [^aand that the said R. S. is ready and willing to attend as a witness, at the trial of the said cause, as this deponent is informed and verily believes.]

[Signed,]

A. B.

Sworn, [*&c.*, *jurat.*]*Form of Habeas Corpus ad testificandum.*

The State of Ohio:

— county, ss.

To the Sheriff of said county—Greeting:

We command you, that you have the body of R. S., detained in [SEAL.] your prison in your custody, as it is said, under safe and secure conduct, before our Judges of the Court of Common Pleas, within and for said county of —, at the court house in said county, on, [*&c.*, *the day the cause is set for trial,*] to testify in a certain action in said court pending, wherein A. B. is plaintiff, and C. D. is defendant. And immediately after the said R. S. shall then and there have given his testimony in the said cause, that you return him to our said prison, under safe and secure conduct. And have you then there this writ. Witness, C. C., clerk of said court, this — day of —, A. D. —.

C. C., Clerk.

[Endorse:] Allowed by the Court of Common Pleas — county, this — day of —, A. D. —.

Attest:

C. C., Clerk.

(n) As to the necessity of the statement of the matter in brackets, see preceding page.

CHAPTER XIX.

THE TRIAL, AND ITS INCIDENTS.

SECTION I. CHALLENGING, EMPANELLING AND SWEARING THE JURY.

1. Challenge to the array.
2. Talesmen.
3. Peremptory challenges.
4. Challenges for cause to the polls.
5. Form of oath to the jury.
6. Form of affirmation to the jury.

II. WHICH PARTY HAS A RIGHT TO BEGIN.

III. STATEMENT TO THE COURT AND JURY OF THE ISSUE.

IV. THE FORM OF OATH AND AFFIRMATION OF WITNESSES.

V. SEPARATING WITNESSES.

VI. EXAMINATION OF WITNESSES.

VII. MOTION FOR NONSUIT.

VIII. AMENDMENT OF PLEADINGS.

IX. DEMURRER TO THE EVIDENCE.

X. VOLUNTARY NONSUIT.

XI. NOLLE PROSEQUI.

XII. WITHDRAWING JUROR.

XIII. BILL OF EXCEPTIONS.

1. For what it may be taken.
2. When exceptions to be taken.
3. How the bill of exceptions is prepared and settled, and what it should contain.
4. Forms of bills of exception.

XIV. THE CHARGE OF THE COURT.

XV. DAMAGES.

1. General rules.
2. Carriers.
3. Damages on foreign bills of exchange.
4. Damages on notes payable in another State.
5. Interest.

XVI. THE CONDUCT OF THE JURY AND GENERAL VERDICT.

XVII. SPECIAL VERDICT.

Challenge to the Array — Talesmen.

SEC. I. CHALLENGING, EMPANELLING AND SWEARING THE JURY.

1. *Challenge to the Array.*

A challenge to the array is an objection to all the jurors returned by the sheriff, collectively, not for any defect in them, but for some partiality, or default in the sheriff or clerk, or the officers who drew the panel. Such a challenge seldom occurs in practice; and from the mode in which jurors are selected, a cause for challenge to the array can seldom arise. When, however, a grand or petit jury is selected, drawn or summoned, contrary to the provisions of the statute relating to juries,* or if the sheriff, or other officer, in executing the writ of venire, shall not have proceeded in the manner prescribed by the statute, the whole array of the jury may be challenged and set aside, and a new venire facias will be awarded, returnable forthwith, in the same manner as if the whole number of grand or petit jurors had failed to attend court, or had been challenged for cause, and set aside by the court.†

If the clerk or sheriff should in any manner tamper with the ballots or box from which the names of the jury are drawn, or put names upon ballots or the pannel, which did not properly belong there, or the like, it would be proper ground for challenging the array.

This challenge is not made until a full jury appear, and is generally waived by a challenge for cause.‡

The challenge to the array may be entered in the form following :

A. B. }
v. } In *Assumpsit*.
C. D. }

This day came the parties by their attorneys, and also came the jurors of the jury impanelled and summoned; and thereupon the said A. B. challengeth the array of the said panel, because he saith that, [*here set forth the matter of challenge with certainty,*] and this he is ready to verify; wherefore he prays judgment, and that the said panel be quashed.

2. *Talesmen.*

When a cause is called for trial, the sheriff calls over the names of the regular jury, who answer to their names and take their seats in the box. If a sufficient number be not present to make a full jury, the panel is made up by talesmen. When twelve jurors are in the box the parties to the suit proceed with their challenges.

(z) Swan's Stat. 489.

(a) Swan's Stat. 498, §16.

(b) 6 Ohio Rep. 19.

 Peremptory Challenges—Challenges for cause.

If the regular jury are out, deliberating upon their verdict, a jury is made up of talesmen.^c

By a recent statute^d it is provided, that when it becomes necessary to summon a talesman or talesmen, either party may make a summary application to the court to issue a venire; and the court, when so requested, shall, as a matter of course, immediately issue a venire, containing the names of so many discreet and suitable persons, having the qualifications of electors, as the court may deem expedient. But if no such application is made, the sheriff summons the talesmen as heretofore, from the bystanders.^e

3. *Peremptory Challenges.*

Each party may peremptorily, that is, without assigning any cause, challenge two jurors.^f The plaintiff is first called upon to make a challenge. He names the juror challenged by him and the sheriff calls a juror to supply the place of the one challenged. The defendant then, in like manner, challenges a juror whose place is supplied; and so the parties proceed, alternately, until their peremptory challenges are exhausted. The parties then proceed with their challenges for cause.

4. *Challenges for cause to the polls.*

The statute provides, that any petit juror who shall have been convicted of any crime, which by law renders him disqualified to serve on a jury; or who has been arbitrator on either side relating to the same controversy; or who has an interest in the cause; or who has an action depending between him and the party; or who has formerly been a juror in the same cause; or is the party's master, servant, counsellor, steward, or attorney; or who is subpoenaed in the cause as a witness; or who is akin to either party, may be challenged for such cause; and the same shall be considered as a principal challenge and shall be tried by the court.^g

And the statute further provides, that if no principal challenge can be alleged against a juror, he may, nevertheless, be challenged on suspicion of prejudice against or partiality for either party; or want of a competent knowledge of the English language, or for any other cause that may render him, at the time, an unsuitable juror; and the validity of such challenge shall also be tried by the court.^h

Infancy, idiocy or lunacy would of course be a proper objection to a juror.

(c) Swan's Stat. 404, sec. 18.

(f) Swan's Stat. 402, sec. 14.

(d) 47 vol. Stat. 34.

(h) Id. Ib.

 Challenges for Cause—Oath and Affirmation of Jury.

It is held in New York that it is no cause of challenge to a juror that he is a free mason, when one of the parties to the suit is a free mason and the other not.¹

A challenge to a juror was sustained where he had said that he believed the defendant was guilty, although he testified that he had no fixed opinion upon the subject of the defendant's guilt; that he only entertained impressions derived from printed statements in papers, and reports in conversation; that he had never heard witnesses to the transactions testify, nor say anything upon the subject in question; if the evidence supported the circumstances he had heard, he had a fixed belief respecting the guilt of the defendant; if those circumstances should be done away, by evidence, he should not consider him guilty.² The rule seems to be this; that whenever a juror has formed an opinion as to what the verdict should be, he is incompetent, although he declare that if the circumstances upon which his opinion is founded are not supported by proof, he is free to change it. And there seems to be no distinction as to the grounds upon which such opinion is founded, whether upon rumors, personal knowledge, or newspaper reports.³

If a juror, after being returned as such, has eaten or drank at the expense of one of the parties,⁴ he will be excluded from the jury.⁵

The statute allows a challenge, where a jurymen is of kin to either party.⁶ The English law requires the kindred challenged to be at least within the ninth degree, and our own courts will probably fix the same limit; for some limit must be fixed.

5. *Form of oath to the Jury.*

You, and each of you, do solemnly swear in the presence of Almighty God, the searcher of all hearts, that you will well and truly try the issue joined, wherein A. B. is plaintiff and C. D. is defendant, and a true verdict give according to the evidence, unless the cause be withdrawn by the parties or dismissed by the court: so help you God.

6. *Form of affirmation to a Jury.*

You [and each of you] do solemnly declare and affirm that you will well and truly try the issue joined between the parties wherein A. B. is plaintiff and C. D. is defendant, and a true verdict give according to the evidence, unless the

(i) *Purple v. Horton*. 13 Wend. 4. See Tidd's Prac. 853, 9th Ed.

(j) 4 Wend. 229; and see 6 Cowen 559; 1 Johns. Rep. 316; 7 Cowen 106; 1 Cowen 432.

(k) *Id.* *Ib.*

(l) Co. Lit. 157.

(m) As to a juror being incompetent on the ground that he is an indorser of a note to the plaintiff, see 19 Johns. 115.

(n) Swan's Stat. 49, sec. 14.

Which Party has a right to begin, &c.

cause be withdrawn by the parties or dismissed by the court: and this you do under the pains and penalties of perjury: so help you God.

SEC. II. WHICH PARTY HAS A RIGHT TO BEGIN.

The general rule stated by the Court in Bank is, that when, by the pleadings, it is apparent that no evidence is required from the plaintiff, the defendant ought to open; but if any, no matter how slight proof is required by the plaintiff, he must begin, that is, he first calls and examines his witnesses, and opens and closes the argument to the jury.^o

Where there is a plea of justification of a libel or of a trespass, there is, (even if there be no plea of the general issue,) an affirmative for the plaintiff to prove, to wit: the making out the damages. And hence it is, that, in some of the older English cases it was held, where the plaintiff must prove unliquidated damages, he had a right to begin, although the defendant had put in a mere affirmative plea. The weight of English authority, however, is, that the defendant in such case has a right to begin.

Thus, in England, in an action for libel or slander, if the defendant pleads justification without pleading the general issue, the affirmative of the issue is on the defendant, and he has a right to begin.^p So in trespass, where there are special pleas of justification, but no plea of general issue, the defendant is entitled to begin, although the declaration alleges special damage.^q

Whether the Court in Bank, in stating the rule referred to, intended to give the affirmative to the plaintiff, when special damage is alleged, but the pleadings require no issue to be proved by him, is left for the reader to consider.

In *assumpsit* for wrongfully dismissing "a pupil and assistant" to a surgeon, the defendant pleaded that the pupil and assistant so misconducted himself as to make it necessary to dismiss him, to prevent him ruining the defendant's practice, and the plaintiff replied *de injuria*: it was held, that, on these pleadings the plaintiff had a right to begin; Lord Denman C. J. saying, simply, he had no doubt upon the subject, and that it was the constant practice in Lord Tenterden's time.^r

Assumpsit on a promissory note for one hundred pounds, brought by the indorsee of the note against the maker. Plea, that it was agreed between the payee and the defendant, at the time of making the note, that the note was to be paid by carrying goods for the payee, and that it was indorsed to the plaintiff without consideration. Replication, that the plaintiff gave fifty pounds for the note, and as to the residue of the counts in the declaration a *nolle prosequi*. It was held, that, on this issue, the defendant must begin, and that if he offered no evidence, the plaintiff was entitled to a verdict for fifty pounds.^s

(o) 16 Ohio Rep. 830.

(p) 14 Eng. C. L. Rep. 895.

(q) 14 Eng. C. L. Rep. 460.

(r) 47 Eng. C. L. Rep. 662.

(s) 32 Eng. C. L. Rep. 665.

Statement of the Issue.

Plea in abatement, in assumpsit, that the promises were made jointly with A. Replication, that they were not made jointly with A. On the trial of this issue the defendant begins.¹

In ejectment, the defendant must admit the whole *prima facie* case of the lessor of the plaintiff to entitle him to begin.² Thus: where the lessor of the plaintiff claimed as heir of W. L., and the defendant claimed the whole property as devisee under the will of W. L., and part of it also under the marriage settlement made on her marriage with W. L., and the defendants admitted at the trial, that the lessor of the plaintiff was the heir of W. L. and claimed to begin; the court held that the defendant had not the right to begin; but that if the defendant had claimed title under the will only, and admitted the title of the lessor of the plaintiff as heir, it would have been otherwise.³

When the defendant pleads an affirmative plea, as payment, and gives no evidence in support of it, it is held in Kentucky, that he shall not be allowed to open and conclude the argument. It is deemed false pleading, entered into for the purpose of securing an advantage. But when there is any evidence, conducing in the slightest degree to sustain the defendant's affirmative plea, he should be permitted to make the most of it, by opening and concluding the cause, provided there is no negative plea relied on as a bar, in whole or in part.⁴

On the trial of an issue out of chancery to determine by a verdict the validity of a will, the defendant in chancery holds the affirmative.⁵

If the counsel for the party holding the affirmative of the issue, argues the case to the jury, and the other party declines to say any thing, the former cannot address the jury a second time.⁶

SEC. III. STATEMENT TO THE COURT AND JURY OF THE ISSUE.

The counsel holding the affirmative of the issue, before any witnesses are called, and after the jury are sworn, states to the court and jury what the issue is; or, if the issue be too general to disclose the questions involved, he states, briefly, the subject matter of his client's claim. The counsel on the other side then states, briefly, what the defence is. In these statements nothing more is said than what is necessary to give the court and jury an intimation of the subject matter in controversy, and no comments are permitted on the testimony to be adduced.

(t) 14 Eng. C. L. Rep. 391.

(u) 25 Eng. C. L. Rep. 408.

(v) 47 Eng. C. L. Rep. 121.

(w) 1 Dana, 525; 4 J. J. Marshall, 275; see 3 Bibb, 346.

(x) 5 Ohio Rep. 278.

(y) 1 Ohio Rep. 60.

SEC. IV. THE FORM OF OATH AND AFFIRMATION OF WITNESSES.

The usual form of oaths and affirmations to witnesses are as follows :

Form of oath to witnesses.

You [and each of you] do solemnly swear, in the presence of Almighty God, the searcher of all hearts, that the testimony you shall give to the court and jury, in the cause now in hearing, shall be the truth, the whole truth, and nothing but the truth : as you will answer to God.

Form of Affirmation to witnesses.

You [and each of you] do solemnly and sincerely declare and affirm, that the testimony you shall give to the court and jury, in the cause now in hearing, shall be the truth, the whole truth, and nothing but the truth : and this you do, under the pains and penalties of perjury.

The form of the oath should always be such as the witness believes most binding on his conscience ; whether that be by uplifted hand ; by the Gospels ; the Cross ; the Pentateuch ; or the Koran.*

Some religious sects do not believe an oath is proper or binding on their consciences, unless it be administered in the form following: "You do solemnly swear by the ever living God, that you will testify," &c.

SEC. V. SEPARATING WITNESSES.

It is sometimes important that witnesses should be examined out of the hearing of each other, as well to prevent their minds from being influenced by the testimony heard, as to detect and expose collusion. A party cannot demand a separation of the witnesses of right ; but it is seldom refused by the court.

Whenever a party asks, and the court orders a separation of the witnesses, the counsel of the party by whom the witnesses are summoned, is required to name the witnesses ; and the court direct the officer to keep them in a separate room until they are called for ; or, to cause them to withdraw, accompanied by a notice that if they remain, they will not be examined.

If, under such circumstances, or by mistake of counsel or of the witness, the witness remains in the room, it is in the discretion of the court whether or not he shall be examined.^a The right of excluding a witness for disobedience of such an order, though well established, is seldom exercised ; but the witness is punishable for the contempt.^b

(a) Willes, 549.

(a) 18 Ohio Rep. 99.

(b) 19 Eng. C. L. Rep. 204 ; 23 Eng. C. L. Rep. 325 ; 25 Eng. C. L. Rep. 327 ; 18 Ohio

Rep. 99. In the Exchequer only, a witness who does not withdraw when ordered, is per-

emptorily excluded from testifying, 19 Eng. C. L. Rep. 204, 537.

SEC. VI. THE EXAMINATION OF WITNESSES.

The law relating to evidence does not, of course, come within the scope of this work. The general routine in the examination of witnesses is only intended to be referred to in this section.

The party who holds the affirmative, first examines his witnesses, reads his depositions, and puts in his documentary and paper evidence. The opposite party then proceeds with and exhausts his testimony. The party who began, then puts in his rebutting evidence, confining himself, in general, to such testimony as repels or modifies the evidence on the other side, and which was not required to make out his case when he before gave in his testimony in chief.

The counsel who begins to examine a witness cannot turn over the examination to other counsel on the same side; it is not necessary, however, that the same counsel that examined the witness in chief, should re-examine him after the cross-examination on the other side; but the re-examination must be confined to the counsel who commences it.

Leading questions, that is, such questions as instruct a witness how to answer, should not be asked on the direct examination, unless the witness be an unwilling one. But in cross-examining a witness, the counsel may ask leading questions, or indeed any questions at all relevant to the cause.^a

If any new fact arise out of the cross-examination, the witness may be re-examined as to it, by counsel on the other side.

The extent to which the examination of witnesses under certain circumstances shall proceed, is regulated by the discretion of the court.^b

The general rule has been already stated, that the party entitled to begin, must exhaust all his testimony in support of the issue on his part, before the opposite party proceeds with his testimony, and can produce no testimony afterwards in reply, except to contradict, cut down, modify, explain, or vary the evidence on the other side. The court may, however, allow, in their discretion, a departure from this rule; and permit the party who began, to supply defects in his evidence, and give other proof, after the opposite party has put in his testimony,^c and even after counsel have closed their arguments.^d

Questions as to the competency of witnesses, and the admissibility of testimony, will generally arise during the progress of the case, and which may involve, in some cases, the whole merits of the case. If either party desire the questions thus arising, to be subjected to the decision of the supreme court, on writ or error, he should except to the opinion of the court when the decision is made, and have them made a part of the record, by a bill of exceptions. This can be done from time to time as the case proceeds.^e

(a) 1 Arch. Pr. 194.

(b) 5 Wend. 301.

(c) 4 Hill 202; 17 Wend. 103, 4; 1 Hill 300.

(d) 12 Wend. 896; 7 Johns. 306; 4 Cowen, 450; 19 Johns. 313.

(e) 43 Vol. Stat. 80.

Motion for a Non-suit.

SEC. VII. MOTION FOR NON-SUIT.

After the plaintiff's counsel has gone through with his testimony and rested his case, if the counsel for the defendant thinks that the plaintiff has not produced sufficient evidence to entitle him to go to the jury, he may move the court for a non-suit.

The most usual grounds of non-suit are mistakes in the names of parties as misjoinder;^f or non-joinder;^g or a mistake in the form of the action;^h or a variance between the declaration and the proof.

If it appear to the court that the evidence is not sufficient, in law, to make out a case, they may, without motion, non-suit the plaintiff; and in many cases where it clearly appears, in the progress of the trial, that the action will not lie, although the objection appears in the record, and might be taken advantage of by motion in arrest of judgment, or by writ of error, the court will direct a non-suit.ⁱ Thus, where suit was brought against a justice of the peace for not issuing mesne process, in a case in which he, in fact, had no jurisdiction, the court, upon hearing the evidence of the plaintiff, on motion of the defendant, arrested the testimony from the jury and directed a non-suit.^j So where it appears that the promise proved is without consideration,^k the court will direct a non-suit.

A plaintiff may be non-suited as to one or more several counts.^l

But it is only in cases where a verdict can be given, that the plaintiff can be non-suited.^m And where one of two defendants, who are charged upon a joint liability, allows judgment to go by default, and the other goes to trial, the plaintiff cannot be non-suited; but such defendant must have a verdict, if the plaintiff fail to make out his case;ⁿ it being a general rule that the plaintiff must be non-suited as to all the defendants, or none when there is a joint liability.^o

If the court improperly non-suit, or refuse to non-suit, a bill of exceptions may be taken.^p

The non-suit may, in many cases, be avoided by amendment of the process pleadings and proceedings.^q

The form of the entry of the non-suit will be given under the head of verdicts and judgments in *assumpsit*.^r

(f) See ante p. 58, 75, 86, 102, 106, as to misjoinder.

(g) See ante p. 76 to 79, 86, 90, 102, 103, as to non-joinder.

(h) See ante p. 26, 27, as to mistake in the form of the action.

(i) 12 Ohio Rep. 35.

(j) *Id.* Ib.

(k) 1 Campb. 256.

(l) 7 Cowen 434.

(m) 2 Stra. 1117, 267.

(n) 3 T. R. 662; Cowp. 488.

(o) Arch. Pr. 212.

(p) 19 Johns. 154; 18 ib. 384; 18 Wend. 169; Swan's Stat. 676, sec. 112; 43 vol. Stat. 80.

(q) See ante p. 843.

(r) See post chap. 21, sec. 3, no. 18.

 Amendment—Demurrer to the Evidence.

SEC. VIII. AMENDMENT OF THE PROCESS AND PLEADINGS.

During the progress of the trial, it may become necessary, on account of some mistake or omission in the process pleadings or proceedings to amend; which, in many cases, can be done so as to prevent either party from escaping from a fair trial of the merits of the case. As to an amendment, the reader is referred to the preceding chapter.^b

SEC. IX. DEMURRER TO THE EVIDENCE.

A demurrer to evidence is a proceeding by which the court are called upon to declare what the law is upon the facts shown in evidence, analogous to the demurrer upon facts alleged in pleading.

The reason, generally, for demurring to evidence is, that the jury, if they please, may refuse to find a special verdict, and then the facts never appear on the record. But this proceeding seldom occurs in practice.

Either party may demur to the evidence of the other, whether it be written or parol.^c If the evidence be written, the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the same, to join in demurrer or waive the evidence;^d for, there can be nothing to be decided in such case, it is said, but a question of law, upon facts that cannot vary.

If the testimony be certain and positive, but parol, the adverse party may demur, and the other party must join in the demurrer; but if the parol evidence be either loose and indeterminate or circumstantial, merely, every fact and conclusion which the testimony conduced to prove, must be distinctly admitted, before a joinder can be demanded.^e

A demurrer to evidence is entered upon the minutes of the court; and either party may then move the court to assign a day for argument.^f The court see that the testimony, about which the counsel disagree, is properly entered on the journal.

Upon a demurrer to evidence, the damages may be assessed, conditionally, by the jury, before they are discharged; or, they may be assessed by another jury after the demurrer is determined; and the latter is the most usual course.^g

Form of Demurrer to Evidence by the Defendant, where the damages are assessed conditionally.

A. B. }
 v. } In [Assumpsit.]
 C. D. }

This day came the parties, by their attorneys; and thereupon came a jury,

(b) See ante, p. 848.

(c) 2 H. Blac. 206; Tidd. 866.

(d) Id. Ib.

(e) Id. Ib. Arch. Prac. 185; 11 Wheaton 171,

320; 12 Wheaton, 383, 389; 1 Blackf. 39, 109.

(f) Swan's Stat. 671, sec. 100.

(g) Tidd, 866.

Demurrer to the Evidence.

to wit, E. F., &c., who being empannelled and sworn the truth to speak, upon the issue joined between the parties, the said A. B., to maintain the issue on his part, showed in evidence to the jury aforesaid a certain instrument, &c., or showed in evidence to the jury aforesaid, by E. F., a witness duly sworn in that behalf, that, &c., [*here state the evidence;*]* and the said C. D. says, that the aforesaid matters to the jury, aforesaid shown in evidence by the said A. B., are not sufficient in law to maintain the said issue on the part of the said A. B., and that he, the said C. D., is not bound by law to answer the same; and this he is ready to verify: wherefore he prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that the said A. B. may be barred of his action aforesaid against him.

Form of Joinder in Demurrer.

And the said A. B., for that he hath shown in evidence to the jury aforesaid sufficient matter in maintenance of the said issue, which matter the said C. D. doth not deny, nor in any manner answer thereto, prays judgment, and his damages to be adjudged to him.

Whereupon it is told to the jury aforesaid, that they should inquire what damages the said A. B. hath sustained, by reason of the matters shown in evidence as aforesaid, in case it shall happen that judgment shall be given upon the evidence aforesaid, for the said A. B.; and the jury aforesaid, upon their oaths aforesaid, thereupon say, that if it shall happen that judgment shall be given for the said A. B., upon the evidence aforesaid, then they assess the damages of the said A. B., by him sustained by reason of the matter shown in evidence as aforesaid, to — dollars; and thereupon the jury, by the assent of the said parties, are discharged from giving any further verdict upon the premises. [*For the judgment for the plaintiff on the Demurrer, see Chapter 21, Sec. 2, form No. 19; and for form of Judgment for defendant on the Demurrer, see same chapter, sec. 3, form No. 15.*]

Form of Demurrer by the Plaintiff where the Jury are discharged.

Proceed as in the preceding form of a Demurrer to the Evidence, to the star, and then as follows:] and thereupon the said C. D., to maintain the issue on his part, showed to the jury aforesaid, by E. F., a witness, &c., [*stating the evidence on the part of the defendant;*] and the said A. B. says the aforesaid matters to the jury aforesaid, shown in evidence by the said C. D., are not sufficient in law to maintain the said issue on the part of the said C. D., and that he, the said A. B., is not bound by law to answer the same; wherefore he prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that his damages, by reason of the premises within mentioned, may be adjudged to him, &c.

Form of Joinder in Demurrer.

And the said C. D., for that he hath shown in evidence to the jury aforesaid

 Voluntary Nonsuit — Nolle Prosequi.

sufficient matter in maintenance of the said issue on his part, and which he is ready to verify; and forasmuch as the said A. B. doth not deny, nor in any manner answer the said matter, prays judgment, and that the said A. B. may be barred from having his aforesaid action against him, and that the jury aforesaid may be discharged from giving their verdict upon the said issue, &c.— Wherefore let the jury aforesaid be discharged by the court here, by the assent of the parties, from giving any verdict thereupon.

 SEC. X. VOLUNTARY NONSUIT.

The plaintiff may submit to a voluntary nonsuit. This usually occurs when there is an unexpected defect in the testimony, or there is reason to apprehend that the jury will find for the defendant. The advantage of this is, that, where there is a nonsuit, which is only a default, the plaintiff may commence another suit against the defendant for the same cause of action, either in the same or another form, or when better prepared with evidence; whereas, if a verdict be once given, and judgment follow and remain thereon, he is forever barred from suing the defendant again for the same cause of action.^a

The plaintiff may submit to a nonsuit at any time before the jurors have actually delivered their verdict.¹

If the plaintiff adopts this course of his own voluntary act, he waives his right to tender a bill of exceptions, or to sue out a writ of error;² but the court, in their discretion, may and often do grant a new trial, where there has been a voluntary nonsuit.³

 SEC. XI. NOLLE PROSEQUI.

The plaintiff may enter a nolle prosequi, at the trial, to some of the counts in his declaration; and the counts so abandoned, are considered as stricken out of the declaration, except so far as they are referred to in other counts for a particular date or fact. So the plaintiff, in actions ex contractu, may, where one of the defendants is discharged by some personal privilege or disability, such as bankruptcy, infaney or coverture, enter a nolle prosequi as to such defendant.¹

The nolle prosequi is entered on the journals of the court, and may be in the form following:

(h) 1 Arch. Pr. 212; 3 Bl. Com. 376.

(i) 2 Wend. 295; 1 Arch. Pr. 212.

(j) 2 Hall, 403; 18 Wend. 169.

(k) Id. Ib.

(l) 5 Hill, 213; 1 Ohio Rep. 36. See ante, 75, 76, and the cases there cited.

 Withdrawing a Juror.

Form of Nolle Prosequi to the whole Declaration.

A. B. }
 v. } In Case.
 C. D. }

This day came the plaintiff, and inasmuch as he cannot deny the matters by the said C. D. above pleaded, now freely here in court confesses that he will not further prosecute his suit against the said C. D.; therefore it is considered that the defendant go hence without day, and recover of the plaintiff his costs herein, taxed to — dollars — cents.

The like, to one or more of several Counts.

A. B. }
 v. } In Case.
 C. D. }

This day came the plaintiff, and as to the said plea of the said C. D. by him (*lastly*) above pleaded, as to the *sixth* and *last* counts of the declaration, saith he will not prosecute his suit against the said C. D. in respect of the [*promises and undertakings*] in the said *sixth* and *last* counts of the said declaration, or any of them; therefore as to the [*said promises and undertakings,*] in the said *sixth* and *last* counts of the said declaration, it is considered that the said C. D. be acquitted, and go thereof without day, and recover of the plaintiff his costs in that behalf taxed to — dollars — cents.

The like, as to some of several Defendants.

A. B. }
 v. } In Case.
 C. D. and E. F. }

This day came the plaintiff, and as to the plea of the said E. F., by him above pleaded, saith, that he will not further prosecute his suit against the said E. F.; therefore it is considered that the said E. F. be acquitted of the promises in the said declaration mentioned, and go thereof without day, and recover of the plaintiff his costs herein, taxed to — dollars — cents.

 SEC. XII. WITHDRAWING A JUROR.

Sometimes the parties agree to withdraw a juror; the consequence of which is, that the cause goes off as if no jury had been sworn, and without affecting the right of either party.

In some of the circuits and in other States, the court exercise its discretion in allowing a juror to be withdrawn, even without the consent of the parties,

 Bill of Exceptions — For what it may be taken.

instead of nonsuited the plaintiff for a defect in his proof; as in case of a surprise or mistake on his part, in the preparation of the cause for trial. Where the defendant or his counsel have wilfully misled the plaintiff as to the nature of the defence, so that he comes unprepared to meet it, courts have, without the consent of the defendant, permitted a juror to be withdrawn; and they have done so, even where the defendant has not wilfully misled the plaintiff.^m

Form of Journal entry where a Juror is withdrawn.

This day came the parties by their attorneys, and a jury being called, came, to wit, E. F., [&c.] who were empanelled and sworn, the truth to speak upon the issue joined between the parties; and thereupon, by consent of parties, and with the assent of the court, G. S., one of the said jurors, is withdrawn: Whereupon it is ordered that the residue of said jurors be discharged, and the cause continued at the costs of, [&c.]

SEC. XIII. BILL OF EXCEPTIONS.

1. *For what it may be taken.*

In the first stages of that process under which facts are to be ascertained, the court decides whether the testimony offered conduces to the proof of the fact to be ascertained, and there is an appeal from the opinion of the court, by a Bill of Exceptions. The admissibility of the evidence being established, the question how far it conduces to the proof of the fact to be ascertained, is not for the court to decide, but for the jury, exclusively, and with which the court only interfere upon motions for a new trial. When the jury have ascertained the fact, another question arises, whether the fact, thus ascertained, maintains the issue joined between the parties: or, in other words, whether the law arising upon the fact, is in favor of one or the other of the parties; and this question is for the court to decide. The court declare what the law is, upon the fact which the jury are to find, and then, from the fact ascertained by the testimony and the law thus declared by the court, the jury make up their verdict.

A Bill of Exceptions is intended to place in the record those questions of law which arise in the Court of Common Pleas, that the opinion of the court may be reviewed by the Supreme Court.

A Bill of Exceptions, then, is founded upon some objection in point of law to the opinion and direction of the court, either as to the competency of witnesses, or a juror, the admissibility of evidence or the legal effect of it, or for overruling a challenge, or refusing a demurrer to evidence, &c. As a substitute for appeals, the statute of this Stateⁿ provides, that "in all cases pending in the court of Common Pleas, or in the Superior court of Cincinnati, either party

(m) 8 Cowen, 127. See 2 Johns. Cases, (n) 43 vol. stat. 80 § 8.
307; 15 Wend. 371.

Bill of Exceptions — For what it may be taken.

shall have a right to except to the opinion of the court, on a motion to direct a nonsuit, to arrest the testimony from the jury, and also in all cases of a motion for a new trial, by reason of any supposed mis-direction of the court to the jury, or by reason that the verdict may be supposed to be against the law or evidence, so that such case may be removed by writ of error."

With the exception of the case of a motion for a new trial because against the evidence, a bill of exceptions, it will be perceived, must always be founded upon some point of law arising from a fact not denied, in which either party is overruled ;^o as for admitting irrelevant evidence, which may have influenced the verdict ;^p or ruling out evidence tending to prove the issue ;^q for refusing to nonsuit the plaintiff ;^r (although the error in this case is cured by the proper proof being subsequently given,) for overruling a demurrer to evidence ;^s or for refusing to charge upon a question of law, provided, the attention of the court was called to it, but not otherwise."

An erroneous opinion of the court or the refusal of the court to instruct, upon a point of law having no possible connection with the case, cannot be made available by a bill of exceptions ; although the supreme court on error will look through the case, and if they find the opinion might have affected the jury injuriously, a new trial will be granted."

A bill of exceptions will not lie for a mis-direction of the judge, as to a matter of fact." Nor can the decision of the court upon a matter resting in their discretion, in general, form the ground of an exception,^t unless the discretion be abused, or some rule of law violated."

If a party offer evidence which is rejected, and except, and then the other party waive the objection, but the party excepting refuse to offer the evidence, he cannot avail himself of his exception on error ;^u though the court of common pleas, in such case, will seal a bill of exceptions, stating the circumstances as they transpired at the time.

When a cause is submitted to the court upon an agreed statement of facts, and either party desire to review the law of the case arising from the facts, the proper mode of bringing the matter upon the record, is, to make the facts a part of the bill of exceptions, upon a motion for a new trial, or, by excepting to the ruling of the court upon the evidence during the trial. An agreed statement of the evidence cannot take the place of a bill of exceptions as a special verdict, unless it be put into the form of a special verdict, and so appear on

(o) 1 Cowen, 622; 2 Caines Rep. 168.

(p) 19 Wend. 232; see 5 Ohio Rep. 169.

(q) Wright, 438, 744, 470; 1 Arch. Pr. 210.

(r) 6 Cowen, 484.

(s) 2 Hill, 620; 6 Cowen, 484.

(t) Cro. Car. 342; 2 H. Bl. 208.

(u) 5 Cowen, 248; 17 Johns. 218; 6 Wend. 208; 15 Ohio Rep. 123.

(v) 16 Ohio Rep. 513; 5 Ohio Rep. 375; 15

Ohio Rep. 123; 13 Ohio Rep. 21; 14 Ohio Rep. 592; 11 Ohio Rep. 489.

(w) 2 Caines Rep. 168; 14 Johns. 304.

(x) See post. "Writs of Error and proceedings thereon."

(y) 3 Ohio Rep. 269; 4 Ohio Rep. 64, 420; Wright, 568, 673, 258; 3 Hill 159, 432; 4 Hill 119.

(z) 7 Serg. & R. 219.

 Bill of Exceptions—When Exceptions to be taken.

the journal, as the finding of a jury, instead of an agreed statement of the facts.*

2. *When Exceptions to be taken.*

The counsel excepts to the opinion of the court verbally, at the time of the decision; or if the exception be to the charge, it is generally done before the jury have delivered their verdict. The practice, however, probably differs in different circuits. The statute^b provides that "when a party to a suit alleges an exception to any opinion, order, or judgment of the court, it shall be the duty of the judges of the court concurring in such judgment, opinion or order, if required by such party during the progress of the case, to sign and seal a bill, containing such exception or exceptions, before the case proceeds; or, if the party consent, the signing and sealing of such bill of exceptions may be suspended until the trial is closed; but said bill of exceptions shall be signed and sealed during the term."

There is nothing in these provisions which should require the court to dispense with a verbal intimation, from the counsel who intends to except, at the time the decision is made; and this is the general rule of courts,^c and peculiarly proper where an exception is intended to be taken to the admission or rejection of a witness or of testimony.

In some of the circuits there is a general complaint that the court will not give a party a distinct and direct statement of the decision made; and from this complaint, probably, arose the provision in the statute just referred to, requiring the court, if a party desire it, to suspend the trial until the bill of exceptions is signed and sealed. This practice, however, does not generally prevail; and in circuits where it does prevail, the court have good reason to believe that they are unwilling to put their decisions into the record; or, that the bar generally, very unjustly suspect their judicial integrity.

It is always, however, necessary, when counsel intend to except, to not only so state verbally to the court, but also, if there be the slightest possibility of any future misapprehension as to the question decided, or as to the facts or testimony connected with the decision, to have the assent of the court and the counsel on the other side, as to the scope and subject matter of the exception, or immediately reduce to writing the question made, so that the substance of the bill of exceptions, can be made up from the written statement. This will not materially delay the case, and will save time and vexatious disputes thereafter. Indeed, the practice is general, for the president judge or the counsel who excepts, to make out at the time the exception is intimated, an informal statement of the precise question which arose, and the decision of the court;

(a) 16 Ohio Rep. 170.

(b) 43 vol. stat. 80 § 3.

(c) See 11 Pet. Rep. 185; 11 Serg. & R. Johns. 812.

267; 1 Mond 215; 8 Serg. & R. 211; 19 Johns.

Rep. 246; 9 id. 845; 7 Wend. 31, 536; 10

 Bill of Exceptions — How prepared and settled.

from which the bill of exceptions is afterwards, and generally after the trial, drawn up in form.

For the same reason, probably, that a statute was passed to give the party excepting a right to have his bill of exceptions signed and sealed before the case proceeds, a further provision has been made, that, on application of either party, and before the jury retire to consider of their verdict, the court shall reduce to writing their charge, upon any point of law involved in the case.⁴ As this is filed in the cause, such parts of the charge as is objected to can be incorporated into a bill of exceptions.

The bill of exceptions must be made out, signed and sealed during the term; unless, by consent of parties, it is to be afterwards signed and sealed as during the term.

If the party excepting neglects to present the bill to the court during the term, he cannot do so afterwards; but is presumed to have waived his exceptions.

3. *How the Bill of Exceptions is prepared and settled, and what it should contain.*

After the exceptions have been taken, they are put into form by the party excepting.

Care and precision of language is required to make out the bill. The testimony connected with the decision excepted to, and which made the decision bear upon the matter in controversy, should be first stated. Without the testimony, in many cases, the decision would appear in the record as the mere annunciation by the court of an abstract principle of law, which, whether right or wrong, would harm no one; and upon such a bill of exceptions, error would not lie.⁵

After setting out such of the facts or testimony as distinctly raise the question intended for review, and no more is necessary or proper,⁶ then state the objection of the counsel, the decision of the court, and the exception thereto; or the charge of the court and the exceptions. Where the exception is to the charge of the judge, and the whole charge is set out, and embraces several points of law, some of which are not excepted to, the exception should, in general, specify the particular points in respect to which the error is alleged.⁷

If the bill of exceptions is a naked statement of facts, and does not, in connection with the record, show that the matter excepted to, was material, nor that any injury was sustained by reason of the decision, it will be wholly unavailable to the party.⁸

(d) 46 vol. Stat. 87.

(e) See post — Writ of error and proceedings, &c.

(f) 15 Wend. 581; 8 Cowen, 123.

(g) 23 Wend 316; see 1 Hill, 91.

(h) 7 Ohio Rep. Part. 1, 212; 4 Ohio Rep. 79, 398.

Bill of Exceptions — Forms of.

In all cases in which the party desires to review the opinion of the court of common pleas, in refusing or in granting a non-suit, or in refusing or granting a new trial, the bill of exceptions must disclose all the testimony before the Court of Common Pleas.¹

So, when it is claimed that the Common Pleas erred in excluding or admitting a witness to testify, the bill of exceptions must contain statements showing distinctly the error complained of.²

The bill should show, on its face, that the exceptions were taken at the trial;³ unless the exception is to the opinion of the court, overruling a motion for a new trial.

When the bill of exceptions is made out in form, by the counsel excepting, ready to sign, it is shown to the counsel on the other side; and such alterations are made as the counsel can agree upon. If counsel cannot agree, then the party who desires an alteration in the bill of exceptions as prepared, should make out in writing the alteration he proposes, and the bill and proposed alteration are submitted to the court, who determine the question. The court may, notwithstanding the counsel have agreed upon the bill of exceptions, correct any error or omission therein; as by correcting the charge or inserting such proof as goes to waive the exception.⁴

4. *Forms of Bills of Exceptions.**Bill of Exceptions for refusing a Non-suit.*

John Nokes, }
v. } In Case. In the Common Pleas of ——— County.
Joseph Styles, }

Be it remembered, that on the trial of this cause, at the ——— term of the said Court of Common Pleas, A. D. ———, the said John Nokes, to maintain the issue on his part, [*or the second or third issue, as the case may be,*] gave in evidence to the jury aforesaid, That, [*&c.,*] —; and further, That, [*&c., stating the entire evidence on the part of the plaintiff;*] and thereupon the said John Nokes, offering no other or further evidence, the counsel on the part of the said Joseph Styles, moved the said court to direct the said John Nokes to become non-suit in that behalf. But the said court then and there held and affirmed, that the evidence aforesaid by the said John Nokes, was sufficient to maintain the said issue, [*or issues,*] and thereupon overruled the said motion of the said Joseph Styles in that behalf; and left the consideration thereof to the Jury aforesaid; whereupon the said Joseph Styles made his exception to the said opinion of said Court. And the jury aforesaid gave their verdict against the said Joseph Styles upon the issue [*or issues*] aforesaid: and the counsel

(i) 17 Ohio Rep. 489, 498.

(j) 17 Ohio Rep. 495.

(k) 5 Hill, 577; 9 Whea. 651; 6 Wend. 268; see Sumner's Rep. 19.

(l) 6 Cowen, 569; 7 Cowen, 364.

Bill of Exceptions—Forms of.

of the said Joseph Styles, prayed that the said court would set their hands and seals to this bill of exceptions : which is done accordingly.

[To be signed and sealed by the judges.

The like for sustaining an objection to the Admissibility of certain Testimony to the Jury.

John Nokes, }
v. } In Assumpsit. In the Common Pleas of — County.
Joseph Styles. }

Be it remembered, that on the trial of this cause, at the — term of the said Court of Common Pleas, A. D. —, the said John Nokes, to maintain the issue on his part, gave in evidence to the jury aforesaid ; [*here state so much of the testimony as will show that the testimony objected to, was material to the issue, as thus, where the defendant offered a witness to prove the signature of the plaintiff to a receipt: the promissory note in the declaration mentioned and rested ; and thereupon the defendant offered in evidence a receipt, in the words and figures following: "Received of Joseph Styles, on his note made by him to me, five hundred dollars."*

Dec. 12, 1849.

JOHN NOKES.

The plaintiff objected to the admission of this receipt in evidence, unless proof should be first made that the same was made and signed by the plaintiff ; and thereupon the defendant, to prove that said receipt was made by said plaintiff, called H. S., a witness in behalf of the defendant, who, being duly sworn, testified that he had never seen the said John Nokes write, but had seen three promissory notes which purported to have been executed by said John Nokes, and which the witness purchased for a horse, and which the said John Nokes afterwards paid to the witness ; that he has no other or further knowledge of the hand writing of said Nokes, except as aforesaid.

The defendant then proposed to prove, by the said H. S., and from his knowledge aforesaid of the hand writing of said plaintiff, that said signature to said receipt was in the proper hand writing of the said plaintiff : to which the plaintiff objected, on the ground that the said H. S. had not sufficient knowledge of the hand writing of said plaintiff, to testify in the premises ; and the court being of the opinion that said witness was incompetent from want of knowledge of the hand writing of the plaintiff, to testify in that behalf, sustained said objection, and refused to permit the defendant to examine the said witness in the premises.] To which opinion of the court [and refusal to permit the defendant to examine the said witness in that behalf,] the defendant excepts and prays that the said court would set their hands and seals to this bill of exceptions ; which is done accordingly.

Bill of Exceptions—Forms of.

The like for Misdirection of the Court.

John Nokes }
 v. } In [Assumpsit.] In the Common Pleas of — county.
 John Styles. }

Be it remembered that on the trial of this cause at the — term of the said Court of Common Pleas, A. D. —, the said plaintiff, to maintain the issue on his part, amongst other things, gave in evidence to the jury testimony tending to prove^m [*Here state the points made by the plaintiff's testimony which connect themselves with the charge excepted to.*] The defendant on his part amongst other things gave in evidence testimony to the jury tending to prove [*Here state the points made by the defendant's testimony which connect themselves with the charge excepted to.*] The [plaintiff] moved the said court to direct the jury, [*setting forth the precise direction asked for; but if no direction was asked, omit this, and say simply:* The court thereupon directed the jury, &c.,] which directions the said court refused to give to the said jury, but on the contrary directed the said jury that [*&c. setting forth the precise direction.*]

To which said direction of the court [and also their refusal to give the said direction moved for as aforesaid,] the said plaintiff excepts, and prays the said court to set their hands and seals to this bill of exceptions: which is done accordingly.

The like for Arresting Testimony from the Jury.

John Nokes, }
 v. } In Case. In the Common Pleas of — county.
 Joseph Styles, }

Be it remembered, that on the trial of this cause, at the — term of the said Court of Common Pleas, A. D. —, the said John Nokes, to maintain the issue on his part, gave in evidence to the jury aforesaid, That, [*&c. —;*] and further, That, [*&c.*] And thereupon the said John Nokes offered to prove that, [*&c. here state the evidence arrested from the jury;*] Whereupon the counsel on the part of the said Joseph Styles interposed, and insisted that the evidence so offered to the said jury by the said John Nokes as aforesaid, was not good or admissible in law upon the issue aforesaid, and then and there moved the said court to arrest the same from the consideration of the said jury. And the said court then and there held and affirmed, that the said evidence so offered to be given to the said jury, by the said John Nokes as aforesaid, was not good nor admissible in law, upon the issue aforesaid, and thereupon granted the said motion of the said Joseph Styles, in that behalf, and arrested the said

(m) The charge of the court deals with the law arising from any legitimate presumptions growing out of the evidence. When, therefore, the bill of exceptions is confined to exceptions to the charge of the court, it is not necessary to give the precise testimony, but what each party may properly claim as results to which the jury may arrive.

Bill of Exceptions—Forms of—The Charge of the Court.

evidence, so offered to the said jury as aforesaid, by the said John Nokes, from the consideration of the said jury; to which opinion of the court the said John Nokes excepted; and the jury thereupon gave their verdict against the said John Nokes upon the issue aforesaid, and the said John Nokes prayed that the said court would set their hands and seals to this bill of exceptions: which is done accordingly.

The like, for refusing a New Trial for misdirection of the Court, and because the verdict was against the law and evidence."

John Nokes, }
v. } In Case. In the Common Pleas of — county.
Joseph Styles, }

Be it remembered, that on the trial of this cause, at the — term of the said Court of Common Pleas, A. D. —, the said John Nokes to maintain the issue on his part, gave in evidence to the jury, That, [*&c. stating the plaintiff's evidence;*] and the said Joseph Styles to maintain the said issue on his part, gave in evidence to the jury, That, [*&c. stating the defendant's evidence;*] and no other or further evidence being offered by either of the said parties, the said Joseph Styles moved the said court, upon the evidence aforesaid, to direct the jury, That, [*&c. setting forth the precise directions prayed for;*] which directions the said court refused to give to the said jury, but on the contrary directed the said jury, That, [*&c. setting forth the precise direction;*] and thereupon the said jury gave their verdict against the said Joseph Styles, upon the issue aforesaid. Whereupon the counsel of the said Joseph Styles, moved the said court for a new trial, upon the issue aforesaid, by reason of the supposed misdirection of the said court so given as aforesaid, to the said jury,* and by reason of the said verdict being against the law of the case, and also by reason of the said verdict being against the evidence. But the said court overruled the said motion, and gave judgment upon the said verdict of the said jury, against the said Joseph Styles. Whereupon the counsel of the said Joseph Styles made their exceptions to the said opinion of the court in that behalf; and prayed that the said court would sign and seal this bill of exceptions: which is done accordingly.

SEC. XIV. THE CHARGE OF THE COURT.

The court in their charge to the jury usually give a summary statement of

(a) When the bill of exceptions is made up in order to review the question as to a new trial on account of the verdict being against the law or evidence of the case, the whole testimony should be fully stated, and as far as possible, in the language of the witnesses. It may be inserted in the bill of exceptions in the same manner as in depositions; that is, giving the names of the witnesses and their exact words.

The Charge of the Court—Damages.

the testimony and the law of the case upon a hypothetical statement of the result of the evidence.

The jury are of course the sole judges of facts. But when the weight of the testimony so preponderates on one side, that the court under the law of the case would grant a new trial should the jury find the other way, the charge of the court generally distinctly sums up the testimony so as to prevent a result so expensive to suitors as to require a new trial. In New York the court, in such case, will non-suit the plaintiff.* Where the case would not clearly call for a new trial, whichever way it was decided by the jury, no intimation implied or otherwise is given by the court to the jury, even as to the weight of the evidence.

It is within the province and it is the duty of the court, to disentangle the case from any mistakes made by counsel in the statement of the testimony, and for this purpose restate and comment upon the testimony.

But the court depart from their province when they instruct a jury to find any facts in issue as proved, or to assume to decide facts for the jury.†

Either party has a right to call upon the court to instruct the jury upon any principle of law growing out of the facts of the case.

As has been heretofore stated, the court are required by statute, on the application of either party, before the jury retire to consider of their verdict, to reduce to writing the charge upon any point of law involved in the case; and such charge must be placed and remain on file among the papers in the cause.‡

SEC. XV. DAMAGES.*

1. General Rules.

In Assumpsit, Covenant, Case, Trover and Trespass, damages are the sole object of the action.

In Debt, the interest only is, in general, included in the damages. Where the action of Debt, however, is brought on the penalty of a contract or bond, to recover damages for the breaches of the condition contained in the contract or bond, the jury, in general, pass upon the breaches assigned, and ascertain the amount due the plaintiff.¶

In Detinue and Ejectment, the damages are nominal.

For the damages in Replevin, the reader is referred to a subsequent Chapter.¶

When the declaration contains several counts, the jury may assess either entire damages upon all or any of the counts, or several damages upon each.¶

(o) 1 Wend. 376; 18 Wend. 169.

(p) See post, Writs of Error and proceedings thereon.

(q) 46 vol. Stat. 87.

(r) As to measure of damages between tenant and reversioner, &c., 3 Eng. C. L. Rep. 181, note: between vendor and vendee on failure to make title, or on a refusal to convey real estate,

see 1 Blackf. 266; 8 Ohio Rep. 49; 4 Ohio Rep. 244; 5 Conn. 222; 2 Sug. Vend. 34, n.; on an appeal bond from a decree, 13 Ohio Rep. 136; against a sheriff for neglecting to sell property, 14 Ohio Rep. 538.

(s) See post, Chap. 23.

(t) See post, Chap. 26.

(u) 1 Arch. Pr. 195.

Damages.

In general, where an injury is sustained, the plaintiff is entitled to recover an amount which will repair it. There must however be a loss, injuriously brought about by a violation of the legal rights of the plaintiff, and whenever loss is coupled with legal injury, the law gives compensation.

Where there is no question of fraud, malice, gross negligence or oppression, no allowance is, in general, made for the time, indirect loss, annoyance or counsel fees, growing out of the prosecution of the suit.*

In general, where fraud, malice, gross negligence or oppression forms a part of, or directly grows out of and induces the act complained of, vindictive or exemplary damages are allowed, not only to recompense the sufferer, but to punish the offender: as in actions of trespass, assault and imprisonment;† or for debauching the plaintiff's daughter;‡ for libel and slander;§ for beating a horse to death;¶ for injury arising from neglect to keep a bridge in repair, &c., &c. But in a suit for negligence in the performance of a contract, as for neglect in making a demand on a note, whereby the indorser is discharged,‡ nominal damages can only be recovered unless some loss resulted.‡

In case of a negligent escape, the actual loss sustained by the plaintiff is the measure of damages.°

In actions of trespass *vi et armis*, the secret intention of the defendant is wholly immaterial as to the amount of the damages.‡ But in actions for a malicious prosecution, or for false representations of another's credit to induce one to trust him, or for libel or slander, the intention of the defendant is the gist of the action. And in an action of trespass to property, real or personal, the abusive language, and acts and circumstances showing an evil intent, are a proper subject of consideration, in assessing the damages.° In trespass, however, for false imprisonment, where the defendant justifies under process of law, the plaintiff cannot show malice in the original prosecution, to enhance the damages.‡

Where there are two or more defendants in an action for a tort, the jury assess damages against all the defendants jointly, according to the amount which the most culpable ought to pay.‡ And where several damages are assessed, the plaintiff may elect which sum he pleases, and enter judgment *de melioribus damnis* against them all.‡ But if several trespasses are alleged in the declaration, to which the defendants plead severally, and are found guilty of distinct trespasses, severally, the damages must be assessed for each trespass against the party who committed it.‡

(v) Sedg. on Dam. 88.

(w) 2 Wils. 205; 3 Wils. 556.

(x) 3 Wils. 18; 13 M. & W. 47.

(y) 3 Johns. 56. (z) 14 Johns. 352.

(a) 10 N. H. 190; and see 15 Conn. 225, 267; 3 Hill, 180; 24 Wend. 429.

(b) 1 Ohio Rep. 504. (c) 6 Ohio Rep. 13.

(d) 2 Greenl. 222; but see 14 Wend. 239.

(e) 5 Taunt. 443; 3 Wils. 19; 14 Johns.

352. The aggravating circumstances should, in general, be alleged in the declaration; 1 Chit.

Pl. 328; 5 Wend. 538, 539; 17 Pick. 78.

(f) 6 Ohio Rep. 144.

(g) Com. Dig. tit. Damages, E. 6; 1 Bibb. 441; 1 Blackf. 142.

(h) 2 Tidd, 896; 9 Pick. 455; Cro. Car. 192, 248; 1 Bibb, 441; 1 Hen. & Munf. 448; see 1 Blackf. 142.

(i) 4 Mass. 419. If an injury be done by two dogs, belonging to different owners, each owner is liable only for the mischief done by his own dog; 20 Pick. 477; 2 Conn. 206.

Damages.

The rule of damages in an action for a continuing nuisance, is, in general, the injury sustained prior to the commencement of the suit.^j

When contracts for the sale of personal property are broken by the vendor not delivering the property, the price not having been advanced, the measure of damages, in general, is the difference between the contract price and the value of the article at the time and place when it should have been delivered. If, at the time fixed for the delivery, the property has fallen in value, the vendee, having lost nothing, can recover nothing but nominal damages.

But where the price is paid in advance, or the purchaser has otherwise (as in the loan of stocks) been deprived of the use of his property, the plaintiff may have the advantage of any rise in the market value, which may have taken place at any time up to the time of the trial.^k But the authorities on this subject conflict: some holding that the market price or value on the day of the breach, controls the measure of damages.^l If the market price is lower, at the stipulated time of delivery and down to the time of the trial, than at the date of the contract, on a count for money had and received, the vendee may recover the amount he advanced, with interest.^m

In general, however, damages accruing after suit brought, cannot be allowed.ⁿ

Where the purchaser has refused to receive the article, the vendor can resell, if he sees fit, and recover the difference between the contract price and that realized at the sale; but if he does not resell, the vendor can recover the contract price in full, with interest.^o

In all cases of a breach of contract, if the party injured can protect himself from damage at a trifling expense, or by any reasonable exertions, he is bound to do so; for, in general, he can only recover for such damages, as by reasonable endeavors and expense he could not prevent.^p

In case of accommodation notes and bills, the party for whose accommodation the note or bill was made, is in general liable for the costs which accrued in the suit by the holder against the accommodation indorser.^q

In actions to recover damages for the non performance of a contract, (except a promise to marry,) the animus or intention of the party in default, or his malice, will not affect the amount of the damages.

Remote or consequential damages cannot, in general, be recovered; but only such as grow directly out of the alleged wrong—the natural and proximate consequence of the act complained of.

(j) 17 Ohio Rep. 489.

(k) See 2 Burr, 1005; 7 Cowen, 681; 1 Stark. 254; 2 East, 211; 9 Wend. 129; 2 Taunt. 257; 24 Wend. 322; 11 S. & R. 452; 3 Mass. 364; 16 Pick. 194; 5 Watts & S. 106.

(l) See 1 Ohio Rep. 189. As to the rule of damages when a note is made for a certain number of dollars, payable in certain articles, at a certain price, see 5 Cowen, 152; 5 Wend. 393; 11 Serg. & R. 445; 5 Hayn. 85.

(m) 2 Conn. 485.

(n) 9 Pet. 116.

(o) As to amount of recovery where goods are sold and a note or bill is to be given on time, and the note or bill is not made, and before the credit expires suit is brought for not giving the note or bill, see 21 Wend. 90; 3 Campb. 329; 5 Watts, 157; 14 Conn. 12.

(p) 7 Greenl. 57. So in trespass; 17 Pick. 284.

(q) 16 Johns. 70; 4 Taunt. 464. See 19 Eng. C. L. Rep. 338; 2 Wend. 481; 27 Eng. C. L. Rep. 547; 9 Mass. 1; 9 Johns. 131.

 Damages — Carriers.

The application of this rule to practice, is difficult.

In an action for an illegal capture of a vessel,¹ or for collision between vessels,² the profits which would have accrued on the voyage, cannot be recovered. So, the profits of a steamboat delayed by bad workmanship, cannot be recovered from the builder.³

In assumpsit or a warranty of goods, the measure of damages is the difference between the value of the goods at the time of the sale, and the actual value in point of fact; if they have been received back, the plaintiff recovers the price he paid; or if he has sold them, he may recover the difference between the price paid and the price received; if before discovery of the unsoundness, he sell them with similar warranty, and is sued thereon, and gives seasonable notice of the suit to his vendor, he may recover also the costs of that suit.⁴

If goods are warranted as fit for a particular purpose, it seems the purchaser may recover what they would have been worth to him had they been so.⁵

In debt on a bond, interest beyond the penalty may in general be recovered as damages.⁶

In trover, a party can ordinarily recover only the value of the property and interest; but if, for the same injury, he sue in trespass, he may recover as well the value of the goods as damages for the unlawful taking; and if, for the same injury, he waives the tort, and sues as for money had and received only, in assumpsit, he can recover only what the goods were actually sold for by the defendant, though less than their real value.

When trover is brought against the owner of property, the plaintiff having a lien, he recovers damages to the extent of his lien; if, however, his lien exceeds in amount the value of the property, then his damages are assessed at the value of the property.⁷ But if trover be brought by a person having only a lien or right of possession, against a third person, he recovers the full value of the property, holding the proceeds (less his lien) for the owner.

 2. Carriers.

When goods are lost by a carrier, the measure of damages is the value of the goods at the place of destination, with interest, deducting freight.⁸

When a carrier neglects to transport goods, or perform any part of his contract, and another conveyance can be found with ordinary care, the damages will be the difference between the freight agreed on and that which the plaintiff has been obliged to pay. But if the plaintiff could not obtain another

(q) 1 Galli. 314.

(r) 1 Howard, 28.

(s) 21 Wend. 342; 4 Day, 35.

(t) 5 Wend. 535.

(u) 1 Stark. R. 504.

(v) 15 Mass. 154.

(w) 5 Bin. 457; 7 Cowen, 670, 681, note.

(x) 5 Watts & S. 436; 8 Johns. 218; 8 Caines, 219; 10 Johns. 1; 6 Ohio Rep. 358.

Damages on Foreign Bills of Exchange and Promissory Notes.

conveyance, (as on account of a canal freezing,) the damages will be the difference between the value of the property at the place from which it was to be conveyed, and its value at the place of destination,⁷ deducting freight.⁷

3. *Damages on Foreign Bills of Exchange.*

It is provided by statute, that when a bill of exchange is legally protested for non-acceptance or non-payment, the drawer or indorser shall be subject to the payment of twelve per centum damages thereon, if drawn on a person or corporation without the United States; and six per centum damages thereon, if drawn on a person or corporation within the jurisdiction of the United States, and without the jurisdiction of this State; and bills in all cases shall bear an interest of six per cent. from the date of the protest until paid.² If there be, however, no protest, the holder can recover no damages beyond principal and interest.²

The above statutory damages do not depend upon the place of payment, but upon the place of residence of the drawee; and hence these statutory damages are not allowed upon a bill drawn on a person in Ohio, and payable in another State or country;³ but when a bill strictly inland, is made, and subsequently indorsed in another state or country, such indorsement is, in legal effect, drawing a bill in one State on a person living in another, and the statutory damages in such case are allowed.²

No statutory damages on account of protest can be recovered on any protested bill of exchange, foreign or inland, if it was understood or intended, at the time of its delivery, that it should or might be paid at any other place than that upon which it was drawn, or by any other person than the one upon which it was drawn.⁴

A foreign bank is entitled to statutory damages, and they may be recovered on the common count for money lent and advanced, under the act⁵ allowing banks to bring joint actions against drawers and indorsers.

The statutory damages on bills drawn on persons out of this State are given as an adjustment of all claims for re-exchange; and, like the principal, interest and costs of protest, should be found by the jury, and embraced in their verdict; and the court cannot assess them and add them to the verdict.⁶

4. *Damages on notes payable in another State.*

When a note is made payable at the city of New York or other place, where

(y) 10 Watt, 418; 14 Johns. 170. See 2 Story, 81; 3 Hill, 333.

(z) Swan's Stat. 589 § 1.

(a) 10 Ohio Rep. 187.

(b) 8 Ohio Rep. 292.

(c) 10 Ohio Rep. 184, 185.

(d) 44 vol. Stat. 69.

(e) 43 vol. Stat. 67; see also 42 vol. Stat. 72; 12 Ohio Rep. 132.

(f) 11 Ohio Rep. 145.

Interest.

exchange is at a premium, and is sued here, the creditor should recover an amount equal to what the proceeds would have been worth, had the maker paid the note as he promised; and the weight of English and American authorities is, that, in such case, the holder of the note is entitled to principal, interest, and the real difference in value between the amount of the note here and at the place where it should have been paid.⁶

I am not aware that this question has been made and decided in Ohio.^h

5. Interest.

In the absence of any contract, creditors are entitled to receive six per cent. interest, on all money, after the same is due; either on bond, note, or other instrument of writing or contract for money or property; and on balances due on settlement, or money withheld by unreasonable and vexatious delay of payment; on judgments from their date; and on money decrees in chancery, from the day specified for their payment, or if no day be specified, then from the day of their entry.ⁱ

Parties may, by contract, agree that interest shall be paid on a debt at the rate of six per cent.

Banks are authorized to loan their safety fund at seven per cent. interest.^j But in general, since the first of March, 1848, by statute then passed, it is provided that in all actions for the recovery of money thereafter prosecuted, all payments of money or property made by way of usurious interest, whether made in advance or not, will be deemed and taken as to the excess of interest above the rate allowed by law, (six per cent.) to be payments made on account of the principal; and the court must render judgment for no more than the balance found due after deducting the excess of interest so paid; and no debtor is to be deemed a particeps criminis on account of having paid or having agreed to pay such exorbitant interest, but must have like remedy and relief in either case. No *bona fide* indorsee, however, of negotiable paper purchased before due, can be affected by any usury exacted by any former holder of such paper, unless he shall have actual notice of the usury previous to his purchase; but the amount of such excess incorporated into negotiable paper may, in such cases, after payment to the indorsee, be recovered back by action against the party originally exacting the usury.^k

Whether this statute operates upon payments of usury made before, or only since the passage of this act, does not clearly appear from its language; but it probably relates only to payments of usury made since the 1st of March, 1848.

(g) 3 Kent's Com. 117, and cases there cited.
(h) See 10 Ohio Rep. 180. The question was not made in that case. In the Circuit Court of the United States, the difference in actual exchange, that is, the expense of transmitting specie, is allowed in such cases.

(i) Swan's Stat. 465. As to notes payable on demand see 17 Ohio Rep. 9.

(j) 43 vol. Stat. 34.

(k) 46 vol. Stat. 55.

Interest.

Before the passage of this act, it was held, that when usurious interest was voluntarily paid and applied by the agreement of the parties as extra interest, the extra interest could neither be recovered back or set off against the principal debt.¹

If payments are made and not applied by the agreement of the parties to the interest, then the court will apply the payments to the discharge of six per cent. interest and the principal, excluding the usury. When a note is renewed from time to time, and unlawful interest added in, in a suit on the last note the court will overhaul the whole transaction, and so give the lender only six per cent. interest.²

If the illegal interest has been incorporated into renewed obligations, annually, annual interest of six per cent. will be allowed.³

The rate of interest upon contracts to be paid in another state or country is regulated by the rate of interest where the contract is payable. Only six per cent., however, is allowed on the judgment.

An agreement to pay interest may be inferred from usage.⁴ It cannot, in general, be recovered on unliquidated damages.⁵ But when money or property is wrongfully detained, interest may enter into the computation of damages,⁶ and is allowed.

In many cases demand is necessary : as where money is in the hands of an attorney, the principal being advised thereof, and he neglects to direct it to be remitted ;⁷ and generally, as between principal and agent, in the absence of any contract or custom which may be evidence of a contract, a factor is not liable for interest, while he is in no default.⁸

For wages, interest is in general allowed from the time demand was made, or from the period when they should have been paid.⁹

A mortgagee in possession is not to pay interest on rents, unless there are special circumstances rendering it equitable that he should do so.¹⁰

Where there is a contract to pay interest, annually, simple interest may be recovered on the interest due.¹¹ It is common, in such cases, to compound the interest, by charging with interest the interest upon the interest, annually ; but this is an abuse.

Where there is a settlement, and interest is added into the account, or when, after interest is due, there is an agreement to turn it into principal, interest will be allowed on such interest.¹²

(l) 17 Ohio Rep. 606; see 11 Ohio Rep. 417; 12 do. 544; 13 do. 115; 17 do. 336. (r) 6 Johns. C. R. 353.

(s) 1 Met. 112; 2 Met. 168.

(m) 12 Ohio Rep. 153.

(t) 2 Galli. 45.

(o) 8 Wend. 109; 7 Id. 315; 1 McLean 411.

(u) 2 A. R. Marsh. 341; 13 Pet. 350.

(p) Peters C. C. Rep. 85; 23 Wend. 525;

(v) 4 Ohio Rep. 373.

but see 1 Johns. 315; 5 Ohio Rep. 410.

(w) 1 Johns. Chy. Rep. 12, 550; 4 Ohio 373;

(q) Seg. on Dam. 401; Swan's Stat. 465; 6 Johns. Chy. Rep. 313; 23 Pick. 167. 5 Ohio Rep. 410.

Interest — Conduct of the Jury.

Where payment is made before a debt is due, if the debt is not on interest, in the absence of any agreement, the payment is applied to the debt without allowance of interest. But where a debt is on interest, and a part payment is made before it is due, the amount paid is applied, as far as it will go, to the extinguishment of the principal, and such portion of the interest as has accrued upon the principal, thus extinguished, at the time of the payment.²

Where payments are made after the debt is due, and exceeding the interest, the interest is discharged up the time of the several payments, and interest calculated on the balances due.⁷

Where the payment is less than the interest due, interest continues on the debt the same as if no payment had been made, until the period when the payments, added together, exceed the interest due, when the interest is discharged, and the balance of the amount of the payments are applied to the reduction of the principal.⁸

SEC. XVI. THE CONDUCT OF THE JURY AND GENERAL VERDICT.

After the judge's charge, the jury either give their verdict without leaving the box, or retire from the bar, in custody of an officer, to deliberate. They are in general kept together; and, (unless by permission of the court,) without refreshment, until they are all unanimously agreed, or until there is no reasonable probability of their agreeing, by further confinement. They are not allowed to speak with any person, in relation to the subject matter of the pending verdict; nor can they receive any fresh evidence in private.^a But they may return into court to hear any evidence of which they are in doubt, or to ask any question of, or further instructions from the court.^b But a member of the court cannot communicate with the jury, privately, respecting the charge.^c

The jury cannot take with them evidence which has not been shown to the court; and if the party for whom the verdict is afterwards given, deliver such evidence to them, it will avoid the verdict.^d But if such evidence is delivered by the opposite party, or by one of the jurors who has not received it from the parties, it will not affect the verdict.^e

In England and New-York the court will not permit the jury to take with them any papers or documentary evidence, other than letters patent, deeds, and other sealed instruments, unless the parties consent.^f But the practice is otherwise, generally, in Ohio.

(x) 5 Ohio Rep. 261, 263; 3 Cowen 86, 676; 2 Hale P. C. 296; see 2 Wend. 497. 87, n.

(c) 14 Ohio Rep. 511.

(y) 1 Johns. Chy. Rep. 17; 2 Id. 213; Wright, 169.

(d) Co. Lit. 227 b.

(e) Cro. Eliz. 616.

(z) Id. 1b.

(f) 24 Wend. 185, 419; Cro. Eliz. 411; 1

(a) 3 Bl. Com. 375; Cro. Eliz. 411, 412; 1 Arch. Pr. 197, 198.

Ld. Raym. 148; 1 Arch. Prec. 198; 3 Johns. Rep. 252.

(b) 7 Johns. 33; 9 Cowen 67; 2 Ro. Abr.

Conduct of the Jury.

While the jury are out, it is their duty to continue together, until they return into court, or at least until they have agreed upon the verdict.^c After they have agreed upon their verdict, the mere separation of the jury, unless there be some suspicion of abuse, (and the slightest is sufficient,) will not avoid the verdict;^d especially, where the jury before they separate, seal up their verdict and afterwards come into court and deliver it in, thus sealed up.^e

(g) 8 Ohio Rep. 405; 1 Cowen, 221; 11 Ohio Rep. 472.

(h) Ohio Rep. 405; 3 Cowen 589; 5 Id. 238; 1 Id. 221. In the case of *Sutliff v. Gilbert*, 8 Ohio Rep. 408, the court say:

"As a general rule a jury shall not be permitted to separate, after retiring from the bar of the court, until they have agreed upon their verdict. Still there may be peculiar circumstances, which would, to some extent, justify a separation. But in no cases would it be proper for individual jurors to mingle with others than their fellows until a verdict is found. And should a jury, of their own pleasure, having been put in charge of a case, leave their room and mingle with the people of the town or vicinity, and afterwards return to their room and agree upon a verdict, it would be good ground for a motion to set aside the verdict, and for a new trial.

Formerly, jurors were not permitted to separate until their verdict was returned into court, and in order to compel them to agree, they were deprived of the necessities of life for the time being. But these rigid rules have been much relaxed in the practice of this state. We do not, it is true, permit jurors to separate until a verdict is found, but we allow them all necessary refreshments, and when they have agreed upon a verdict, if the court is not in session, they are permitted to put it under seal, and then separate. This verdict they return when the court again convenes. The verdict thus returned has the same effect and must be treated in the same manner, as if returned in open court, before any separation of the jury had taken place. But if after having once agreed, and put their verdict under seal, a jury shall separate, and subsequently meet in their room and change the sealed verdict, such altered verdict could not, with propriety, lay the foundation of a judgment. Such conduct in a jury would constitute that degree of misbehavior, for which a verdict ought to be set aside. The most common practice of this court is, to direct the jury, that if the court shall not be in session when they shall have agreed, to return their verdict to the clerk; and

if he cannot be found, to put it under seal, and bring it in at the opening of the court. In thus far relaxing ancient rules, we have experienced no inconvenience, and I have no doubt we might go further without any danger; for I believe the more confidence is placed in jurors, the more they are treated like reasonable men, the more will right and justice, through their instrumentality, be done.

In the case under consideration, the jurors did not misbehave. They did not separate until a verdict was found and placed under seal. This same verdict was, at the opening of the court on the next morning, delivered to the court. As before remarked, it must be treated and considered the same as if returned before there had been any separation of the jury. The question then arises, whether the court, after a jury have once returned their verdict, have the power to remand them to their room for further consultation. When the jury return a general verdict settling the rights of the parties, and upon which a judgment can be entered, or where they return a special verdict, finding the facts of a case and leaving the questions of law arising upon those facts to the court, it would be improper for the court to send them out again for further consideration. If such verdict was against law or evidence, the only relief against its effects would be on a motion for a new trial. But where the jury have decided the issue between the parties, but have failed to return a complete verdict, as, for instance, where, on an action on a promissory note, they have found for the plaintiff the amount of the note with interest, but have not specified in dollars and cents that amount, they may with propriety be returned to their room to make the computation of interest.

The case under consideration is somewhat analogous. The jury found in favor of the plaintiff, they fixed upon the rule of damages, and that rule was, the amount for which the property in litigation sold, together with the interest from the specified time. Nothing remained but to compute this interest, and for this purpose the jury might well be sent out. It was not with a

Conduct of the Jury—General Verdict.

If the jurors eat or drink at the expense of the party for whom they find, it will avoid the verdict.^a

It is improper for the jury to agree that each put down a sum, divide the whole by twelve, and adopt the quotient as their verdict.¹ But if this be done merely as a reasonable mode of ascertaining the general result of the opinions of the jury, and without binding themselves to abide, at all events, by the contingent result, the verdict is good.¹ In general, however, there is deception practiced by some of the jury, who, knowing the amount which most of them will adopt as the verdict, put down a very large or a very small sum, so as to bring about a result approximating to their own opinion.

The affidavits of jurors will not be received to impeach the verdict for mistake or error in respect to the merits, nor to prove irregularity or misconduct on the part of the jury.² But they may be received to support the verdict.¹

The verdict must comprehend the whole issue or issues submitted to the jury, otherwise the judgment founded upon it may be reversed.³

In cases of several counts or issues, the jury may find for the plaintiff on some, and for the defendant on the rest;⁴ and whenever either party desire it, the court will direct the jury to find for the plaintiff or defendant, specifically, upon each count and issue; and if the action be slander or libel, upon each set of words and each issue.⁵

In actions ex delicto, against several defendants, the jury may find one guilty and acquit another.⁶

When the jury have agreed upon their verdict, they return to the bar. Their names are then called, and if all are present, they are asked by the clerk if they have agreed upon their verdict; and if so, for whom they find.

The foreman of the jury then pronounces the verdict in the presence of the other jurors, which is either general or special. The general verdict (which is the usual one) is then delivered viva voce, in which the jury, by their foreman, announce that they find for the plaintiff or for the defendant; and if for the plaintiff, and in actions for damages, they at the same time state the amount of the damages, thus: "*We find for the plaintiff (two hundred and ten) dollars damages,*" or "*We find for the defendant.*"⁷

In case of several issues, the jury announce their verdict thus: "*We find for the plaintiff on the [first, third and fifth] issues, two hundred and ten dol-*

view to make any change in the verdict, or to settle any new principle, but to carry out the original finding. And if there was any evidence before the jury showing the amount for which the property had been sold, and which had by them been overlooked, it was proper for the court to refer them to it.

(h) Co. Litt. 227; 1 Hill. 207.

(i) 10 Wend. 595; 1 Cowen 238; 15 Johns. 87.

(j) 4 Johns. 487; 1 Mass. 530, 543

(k) 5 Hill. 560; 10 Ohio Rep. 459; 6 Cowen 54; 1 Wend. 297; 4 Johns. 487.

(l) Id. lb.

(m) 5 Ohio Rep. 227, 259; 6 Ohio Rep. 521; 3 Salk. 372; 9 Ohio Rep. 181; 7 Id. part 2, 232; 9 Ohio Rep. 131. See post "Writs of Error," &c.

(n) Arch. Pl. 213

(o) See ante 555, note.

(p) See ante 102, 103, 911.

(q) 3 Bl. Com. 377; 1 Arch. Pr. 196, 213.

Special Verdict.

lars damages; and for the defendant on the [second and fourth] issues. But no particular form is required.

The verdict thus informally announced is put into form by the clerk.*

If the jury have made any mistake in their verdict, so that the same cannot be put into proper form, or the principle upon which it is found cannot be carried out, or if they have overlooked an issue, or have otherwise committed an error, (as omitting interest,) the court will direct them to again retire and correct the verdict.* But after a jury have announced their verdict, and have been discharged and separated, they cannot be recalled to alter or amend it.†

SEC. XVII. SPECIAL VERDICT.

The jury are not compelled to give a general verdict, but may give a special verdict, setting forth the facts, and require the court to decide the law upon the facts stated.‡

A special verdict seldom occurs in practice.

When there are doubts as to the legal effect of the evidence, a special case can be made in the form of a special verdict, instead of demurring to the evidence. A minute of the facts, thus specially found, being made at the time by the court or counsel, the verdict is afterwards drawn up in form by the attorney of the plaintiff, and settled in the same way by the counsel and court as has heretofore been mentioned in regard to a bill of exceptions,‡ and is then entered at length on the journal of the court as the special verdict of the jury, and set down for argument. The form of a special verdict is given in a subsequent chapter.¶

(r) Wright 645; 3 Ohio Rep. 384; 8 Ohio Rep. 405; 2 Ohio Rep. 81;

(s) 8 Ohio Rep. 405; 7 Johns. 32; see ante p. 918, note.

(t) 11 Ohio Rep. 472; but see 8 Ohio Rep. 405.

(u) Swan's Stat. 496; see the form of the verdict post chap. 21, sec. 3, No. 8.

(v) See ante, p. 906.

(w) See chapter 21, sec. 3, Form No. 8.

CHAPTER XX.

PROCEEDINGS AFTER TRIAL AND BEFORE JUDGMENT.

SECTION I. MOTION TO SET ASIDE THE VERDICT, AND FOR A NEW TRIAL.

1. Within what time to be made.
 2. By whom to be made.
 3. Grounds of the motion generally.
 4. For the want of a proper jury.
 5. For misbehaviour of the prevailing party.
 6. For misconduct of the jury. See ante, p. 917 to 920.
 7. The absence of the party, his counsel, or a witness.
 8. Surprise.
 9. On account of newly discovered testimony.
 10. Excessiveness of the damages.
 11. Smallness of the damages.
 12. Misdirection of the court, and the admission or rejection of testimony.
 13. Because the verdict is against the law or the evidence.
 14. How the motion made, with forms.
 15. Proceedings if the motion is allowed.
 16. Proceedings if the motion is overruled.
 17. Costs of the term when a verdict is set aside.
- II. MOTION TO SET ASIDE A NONSUIT. See ante, p. 900.
- III. MOTION IN ARREST OF JUDGMENT.
- IV. MOTION FOR REPLEADER.
- V. MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO.
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SEC. I. MOTION TO SET ASIDE THE VERDICT, AND FOR A NEW TRIAL.

1. *Within what time to be made.*

This motion is generally made immediately after the verdict is rendered. In some of the circuits, the rules of court require a party to make the motion on the same day that the verdict is rendered. But the practice differs in different circuits. If not made during the term, and judgment is entered on the verdict, it is of course a waiver of the motion.

It must precede a motion in arrest of judgment.^a

(a) Swan's Stat. 671, §98.

Motion for a New Trial—Grounds of the Motion.

2. *By whom to be made.*

In general, where there are several defendants, they must all join in the application; and where there are several issues, the motion for a new trial must be as to all the issues.^b

3. *Grounds of the motion, generally.*

This application is in general made on one or more of the following grounds:

- 1st. For the want of a proper jury.
- 2d. For misbehaviour of the prevailing party.
- 3d. For misconduct of the jury.
- 4th. The absence of the party, or his counsel, or a witness.
- 5th. Surprise.
- 6th. On account of newly discovered evidence.
- 7th. Excessiveness of the damages.
- 8th. Smallness of the damages.
- 9th. Misdirection of the court, and the admission and rejection of testimony.
- 10th. Because the verdict is against the law or the evidence.

4. *For the want of a proper Jury.*

It seems that in Kentucky, whatever would be a good ground of challenge to a juror, if discovered in time, will be cause for granting a new trial, if not discovered until the jury have retired to consider their verdict.^c

But this does not seem to be the rule in this State; for, a new trial will not be granted on the ground that a juror had, unknown to the party, formed and expressed an opinion, and prejudged the case; although not discovered by the party until after the trial.^d The party should have challenged the juror; and by not putting the inquiry to the jury as to previously formed opinions, and ascertaining, or at least endeavoring to ascertain the fact, such cause of challenge is waived, and the party cannot afterwards avail himself of such neglect to set aside the verdict. But if the party put the inquiry to the jury as to previously formed opinions, and thus endeavored to ascertain the fact before the jury were sworn, or by an examination upon voir dire, and failed to ascertain the fact which would have disqualified, and it be afterwards discovered that a juror did not stand indifferent in the cause, a new trial will, it seems, be granted.^e

So, objections to a juror on account of his not being a citizen of the county

(b) Buller's N. P. 326.

14 Mass. 205; see 5 Mass. 67.

(c) Hardin, 167; 4 Bibb, 45, 272, 191; 4

(e) 1 Gilman, 659; 14 Mass. 205; and see 13

Litt. 117; 3 Bibb, 347.

Ohio Rep. 367; 3 Scam. 412; 1 Robinson, 735;

(d) 7 Watts & Serg. 415; 18 Ohio Rep. 367; 9 Shep. 198.

Motion for a New Trial—Grounds of the Motion.

or State, or having been called by mistake in the place of a regular juror; or on account of any mistake or omission in his being summoned or empanelled, where no fraud, collusion or apparent injury has ensued, cannot avail a party on a motion for a new trial.^f Where, however, a mistake as to a juror has been intentional and productive of some injustice, the court will set aside the verdict:^g the court in such case exercising a discretion.^h

5. *For Misbehavior of the prevailing Party.*

If a party for whom a verdict is rendered, deliver to the jury, after they have left the bar, evidence, which has not been shown to the court, will avoid the verdict, unless it appear that the jury did not look at it.^a

Any tampering with the jury by a party, personally, or through others, to influence their verdict, will avoid it.ⁱ But merely desiring a juror to attend at the trial of the cause, is no ground for a new trial.^j

Where handbills reflecting on the plaintiff's character were distributed in court, and shown to the jury on the day of the trial, a new trial was granted, although the defendant by his affidavit, denied all knowledge of the handbills.^k

Where by fraudulent tricks upon the part of the defendant, the plaintiff's attorney was taken by surprise and the defendant thereby obtained a verdict, the court granted a new trial.^l

6. *For Misconduct of the Jury.*

This subject has been already adverted to when treating of the conduct of a jury.^m

The affidavits of jurors will not be received, for the purpose of showing that the verdict should be set aside on account of the misconduct of the jury; but will be received to explain or repel any charges made against them.ⁿ

7. *The absence of the Party, his Counsel or a Witness.*

It is rare to set aside a verdict on account of the absence of counsel or a witness; for the party should have applied before the trial for a continuance; though it has sometimes been done.^o

(f) 1 Pick. 38; 1 A. K. Marsh. 212; 4 Yerg. 111; 9 Dana, 208; 7 Met. 326.

(g) 12 East, 229.

(h) See 7 Wend. 417.

(i) Co. Litt. 227 b.;

(j) 2 Arch. Pr. 255; 13 Mass. 218; 1 Serg. & R. 169.

(k) 1 Stra. 643.

(l) 3 B. & P. 272.

(m) 2 Arch. Pr. 256; see 1 Burr. 352; 5 Taunt. 277; 1 W. Bl. 298.

(n) See ante, p. 917, et seq.

(o) 1 Halst. 344; 2 Salk. 645; 3 B. & A. 328; 1 Caine's Rep. 111; 2 Chitt. Rep. 209; 3 Taunt. 484; 2 Caine's Rep. 336, 394; 8 Dana, 81; 1 Litt. 24; 4 Litt. 1; 1 A. K. Marsh. 350.

Motion for a New Trial — Grounds of the Motion.

For a like reason, a new trial will seldom be granted when a verdict has been given or a non-suit entered, for want of evidence which might have been produced on the trial;° and, in general, the absence of a material witness will not be allowed as the ground for a new trial, where the party might have moved for a continuance.^p

8. *Surprise.*

When a witness absents himself during the trial, or is taken suddenly ill during the trial, so that he cannot be examined, the court will grant a new trial.^q So, where the attorney of one of the parties had in his possession a deed, important to the rights of the other party, and, before the trial, delivered it to a third person, without apprising his adversary, who notified the attorney to produce the deed, and, on trial, first learned that it was not in his possession,^r the verdict was set aside.

In no case, however, is a new trial granted on account of surprise, when the surprise may be attributed to laches or want of diligence;^s or, having occurred before the trial, could have been avoided by an application to put off the trial.^t

Unexpected evidence,^u or, an expected defence,^v or, the discovery after the trial of the incompetency of a witness,^w will not entitle a party to a new trial.^x So, the unexpected rejection of a copy of a writing which was not competent evidence, will not justify granting a new trial.^y

But no very definite rule can be laid down upon this subject, as it must be left very much to the discretion of the court.

9. *On account of newly discovered Evidence.*

To obtain a new trial on the ground of newly discovered testimony, it must be made to appear by affidavits:

1. That the evidence has been discovered since the trial.^z
2. That no laches is imputable to the party;^a that is, that the evidence with reasonable attention and diligence, could not have been discovered before the trial.
3. That the newly discovered evidence is not only material, but of such a

(o) 1 Wils. 98; 3 Salk. 361.

8 Taunt. 236; 2 Moore, 179.

(p) 15 Johns. 298; 8 Taunt. 296.

(v) 9 Johns. 77.

(q) 25 Wend. 668; 14 Johns. 112.

(w) 1 T. R. 717; 1 B. & Pull. 429, n.; 17 Mass. 515.

(r) 7 Wend. 62.

(x) But see 15 Mass. 378.

(s) 1 A. K. Marsh. 334, 350; 3 McCord, 258; 4 N. Hamp. 118; 6 Halst. 242.

(y) 7 J. J. Marsh. 316.

(t) 4 Bibb, 70; 1 J. J. Marsh. 96.

(z) Caine's Rep. 155; 10 Wend. 285.

(u) 4 Litt. 117; 4 Halst. 225; 4 Johns. 425;

(a) 18 Johns. 488; 5 Wend. 127; 10 id. 285.

Motion for a New Trial — Grounds of the Motion.

nature that its legitimate effect would be, probably, to require a different verdict.^b It must not be merely cumulative; that is, additional facts and circumstances going to establish the same facts which were controverted on the trial; or of additional witnesses to the same facts and circumstances,^c unless the testimony is of a different kind and character from that adduced on the trial.^d Thus, if the question controverted was, whether a bond had been paid; and witnesses were examined on the trial to prove payment by circumstantial evidence, but the defendant failed in satisfying the jury that he had paid the bond; if, after the trial, he find a receipt showing the payment, and show that he had before made reasonable search for it, the court would not deem this merely cumulative, but direct testimony, and would grant a new trial.

When the newly discovered evidence is merely for the purpose of impeaching the testimony of a witness, it will form no ground for a new trial.^e

4. The newly discovered evidence must be disclosed in the affidavit, so that the court may determine whether, by the introduction of the evidence, a different verdict ought to be obtained.^f For, if, with the newly discovered evidence before them, the jury ought to come to the same conclusion they have done, it would be useless to grant a new trial.^g

10. *Excessiveness of the Damages.*

Where the damages may be ascertained by mere calculation and there be a material mistake, and in other actions on contracts, if it appear clearly that the damages are excessive, the court will grant a new trial.^h But an inconsiderable excess, even in assumpsit, is no ground for setting aside the verdict.ⁱ

In actions *ex delicto*, such as for criminal conversation,^j seduction,^k battery,^l false imprisonment,^m slander,ⁿ malicious prosecution,^o or the like,^p the verdict will not be set aside, unless the amount of damages is so flagrantly outrageous and extravagant as to show that the jury acted corruptly, or under the influence of passion, partiality or prejudice.^q

(b) 4 Ohio Rep. 44; 3 Caine's Rep. 182, 186.

(c) 8 Johns. 84; 6 Pick. 114, 116; 15 Johns. 210; 10 Pick. 16; 9 Cowen, 266; 1 A. K. Marsh. 151; 5 Ohio Rep. 375.

(d) 4 Wend. 579.

(e) 1 Caine's Rep. 24; 5 Ohio Rep. 375; 4 Johns. 425; 9 Ohio Rep. 147; 5 id. 248; 8 id. 255; but see 14 Johns. 186.

(f) 1 A. K. Marsh. 188; 4 Ohio Rep. 44; 1 Caine's, 24; 5 Halst. 250; 4 Johns. 425; and see 6 Ohio Rep. 87.

(g) *Per HITCHCOCK, J.* 4 Ohio Rep. 45.

(h) 1 Taunt. 491; 2 Arch. Pr. 254; 12 Ohio Rep. 132.

(i) 1 Dana, 355; 6 Johns. 270; Litt. Sel. Ca. 178; Hardin, 317; 12 Ohio Rep. 132.

(j) 4 T. R. 651; 15 Wend. 270; 1 Burr. 609.

(k) 11 East, 23; 3 Wils. 18.

(l) 5 T. R. 257; 2 Wils. 252.

(m) 2 Wils. 160, 205, 244.

(n) 13 Ohio Rep. 366.

(o) 23 Wend. 85; Cowp. 37.

(p) Cowp. 230; 2 W. Bl. 929.

(q) 9 Johns. 45; 10 Id. 443; 12 Id. 234; 13 Ohio Rep. 366.

 Motion for a New Trial—Grounds of the Motion.

11. *Smallness of the Damages.*

On the other hand, in actions for torts above mentioned, a new trial will not be granted on account of the smallness of the damages,¹ unless it have arisen from some mistake in point of law, either upon the part of the court² or of the jury,³ or from some unfair practice on the part of the defendant.⁴

The omission to assess nominal damages where substantial justice has been done, is no cause for a new trial.⁵

12. *Misdirection of the Court, and the admission or rejection of testimony.*

These grounds of a motion for a new trial have been adverted to, in treating of the bill of exceptions.⁶

Where the court see that justice has been done, they will not set aside the verdict to let in evidence improperly rejected, or where improper evidence merely cumulative was admitted on the trial, when such evidence, whether admitted or rejected, would not vary the result.⁷ So, where justice has been done, a new trial will not be granted to let in a technical defence.⁸

If the court erred in favor of the party moving for a new trial,⁹ or if the observations of the court to the jury, which are complained of, were erroneous, but were immaterial and did not affect the merits of the case, a new trial will not be granted.¹⁰

13. *Because the verdict is against the law or the evidence.*

In general, where a verdict is against law, a new trial will be granted. But where the verdict is not in accordance with strict law, but is just, and the rigorous exaction of sharp legal principles would, in the case, be hardly reconcilable with conscience, the court will not disturb the verdict.¹¹

So, if the jury find a verdict contrary to the evidence, the court will, in general, grant a new trial. But if, on the whole, the justice of the case do not require it,¹² or, a verdict be found for the defendant, in a vexatious or hard action, or for the plaintiff, after an unconscionable defence,¹³ a new trial will not be granted, unless some rule of law has been violated.¹⁴

(q) *Str.* 940, 1061; 2 *Doug.* 509.

(r) *Str.* 1259; 2 *Doug.* 510.

(s) *Str.* 425.

(t) 2 *Salk.* 1647; 2 *Arch. Pr.* 254.

(u) 5 *Blackf.* 381.

(v) See ante, p. 903.

(w) 6 *Ohio Rep.* 87.

(x) 5 *Ohio Rep.* 109.

(y) 10 *Ohio Rep.* 162.

(z) 5 *Ohio Rep.* 88, 509; 23 *Wend.* 79; 25

Id. 417; 4 *B. Monroe*, 386; 13 *Conn.* 453; 21 *Wend.* 354.

(a) 5 *Ohio Rep.* 109; 2 *Arch. Pr.* 253; 3 *B. & C.* 357; 6 *Ohio Rep.* 87.

(b) 4 *T. R.* 468; 3 *Wils.* 273; 2 *Id.* 302, 362; 2 *W. Bl.* 1221; 2 *Burr.* 936; *Cowp.* 597; 1 *M. & S.* 576.

(c) 1 *Burr.* 11, 54; 3 *Id.* 1306; 2 *Salk.* 653, 644, 648.

(d) 2 *Cowen*, 479; 2 *Price*, 282; 4 *Bing.* 195

Motion for a New Trial — How made.

If the evidence given on the trial was contradictory or doubtful, there being no decided preponderance either way, a new trial will not be granted; and the rule in general, is, that the verdict must be manifestly and palpably against the weight of evidence, to authorize the granting of a new trial on that ground.*

Of course, where the verdict depends on the credit of witnesses, the court will seldom set it aside.^f

Where facts are disclosed on a motion for a new trial, affirming the correctness of the fact found and involved in the verdict, a new trial will not be granted.^g

Where a jury have found a verdict either against the law or evidence, in favor of the defendant, in a case where on the merits, the plaintiff could recover but a trifling sum, the court will refuse to interfere, because the interference would, in fact, be a prejudice to the plaintiff.^h

In Ejectment, after a verdict for the defendant, a new trial is hardly ever granted; for, inasmuch as the judgment is no bar to a subsequent action,ⁱ and a subsequent adverse judgment vacates the former judgment,^k the plaintiff may as well begin anew, as pay the costs on a new trial.^l

14. *How the motion made, with forms.*

Upon the motion being made in open court, the clerk enters on the journal, immediately after the entry of the verdict, the motion, as follows:

And thereupon the [defendant] moved the court to set aside the said verdict and for a new trial, for reasons on file.

The party moving for a new trial files with the clerk the reasons of the motion, which are usually headed thus:

A. B. }
v. } In [Assumpsit.]
C. D. }

The said [C. D.] now comes and moves the court to set aside the verdict and for a new trial in this cause, for the reasons following:

I. That [&c.]

J. S., Att'y for C. D.

[Date.]

(e) 6 Ohio Rep. 456; 12 Wend. 27; 12 N. Hamp. 171; 6 Leigh, 230; 5 Leigh, 598; 7 Ohio Rep. (Part 1) 376; 5 Id. 245.

(f) Stra. 1142; 2 Hill, 576; 2 Wend. 353; 6 Cowen, 682.

(g) 6 Ohio Rep. 409, 417; 1 Halst. 484.

(h) 5 Mass. 365.

(i) 6 Ohio Rep. 255; 5 Id. 245

(j) 5 Ohio Rep. 509.

(k) Id. Ib.

(l) 6 Ohio Rep. 255. A judgment in Ejectment, however, until reversed or vacated by a subsequent adverse recovery, is conclusive against parties and privies for the time laid in the declaration; 5 Ohio Rep. 509. For the effect of a judgment in ejectment in collateral cases, see 1 Edw. Chy. Rep. 331.

Motion for a New Trial — Proceedings of Court on — Costs.

15. *Proceedings if the motion is allowed.*

If the motion is allowed, the cause is continued, and proceeds to trial in like manner as if no trial had been had.

The journal entry in such case may be as follows :

Form of Journal Entry where a motion for a New Trial is allowed.

A. B. }
 v. } In [Assumpsit.]
 C. D. }

This day the motion heretofore made in this cause to set aside the verdict and for a new trial was heard by the court ; on consideration whereof, it is ordered, that said verdict be and the same is hereby set aside and a new trial granted ; and it is further ordered [that the costs herein abide the event of the suit, or say] that within sixty days the costs herein of the present term be paid by the [plaintiff or defendant,] and this cause is continued.

16. *Proceedings if the Motion is overruled.*

We have already seen^m that exception can be taken to the opinion of the court overruling a motion for a new trial on account of the verdict being against the law or evidence, or for the misdirection of the court. The form of the bill of exceptions, in such case, has already been given.

If the motion is overruled the journal entry is generally in the form following :

Form of Journal Entry where a Motion for a New Trial is overruled.

A. B. }
 v. } In [Assumpsit.]
 C. D. }

This day the motion heretofore made in this cause to set aside the verdict and for a new trial, was heard by the court ; on consideration whereof it is ordered that said motion be and the same is overruled. Thereupon a bill of exceptions, signed and sealed by the court, was filed, and is made a part of the record herein.

17. *Costs of the Term when a Verdict is set aside.*

When the verdict is set aside on account of a mistake made by the court in the law, the costs generally abide the event of the suit, for it is the misfortune and not the fault of either party, that the costs of the term have been incurred.

Motion in Arrest of Judgment.

But in most other cases the court require the party making the motion to pay the costs of the term; though the court in all cases may exercise a discretion, as to the terms upon which they allow a new trial.

SEC. II. MOTION TO SET ASIDE NON-SUIT.

This subject has been already sufficiently adverted to,^a and is only here mentioned as one of the motions which may occur after verdict.

SEC. III. MOTION IN ARREST OF JUDGMENT.

As there are but few errors that can be taken advantage of by a motion in arrest of judgment, it does not very often occur in practice.

The difference between this motion and that for a new trial, is, that the latter must be for some matter wholly extrinsic and foreign to or *dehors* the record; while the former must be for some matter intrinsic and confined to the record.^b

If it appears from the declaration that the plaintiff has no cause of action, the judgment will be arrested.^c

Objections, however, to the form of the action, the process, &c., and all technical objections to the declaration or other pleadings, are cured by the verdict.^d

The court will presume a great deal to uphold a verdict.^e Thus, where a count for money had and received, omits to state for whom or for whose use it was received, the court will presume, after verdict, that such use was proved.^f

Where a fact, which ought to be alleged in the declaration, is supplied in the plea, the judgment will not be arrested.^g

Whenever the facts are substantially alleged, no matter how informally, which the party was bound to prove on the trial in order to entitle him to a verdict, the judgment cannot be arrested.^h

Where there is a general verdict, if there be a good count in the declaration, judgment must follow on the verdict.

What is said in a subsequent chapter as to writs of error, is, in general, equally applicable upon a motion to arrest the judgment, when the error relates to the proceedings before verdict.ⁱ

The journal entry of the motion follows after the motion for a new trial is overruled, or if no motion for a new trial has been made, it follows after the verdict, or assessment of damages on default, thus:

- | | |
|---|---|
| (a) See ante p. 900. | (s) Id. lb. |
| (o) 1 Sellen's Prac. 501. | (t) 2 Ohio Rep. 197. |
| (p) 2 Ohio Rep. 204. | (u) 42 vol. Stat. 72; 14 Ohio Rep. 127. |
| (q) 42 vol. Stat. 72; Swan's Stat. 687, sec. 141. | (v) 15 Ohio Rep. 238. |
| (r) 2 Ohio Rep. 204. | (w) See post, "Writs of Error," &c. |

 Motion in Arrest of Judgment—Repleader.

Form of Journal entry of a Motion to arrest the Judgment.

The defendant now comes and moves the court to arrest the judgment herein, for reasons on file.

The reasons filed are usually in the form following :

A. B. }
 v. } In [Assumpsit.]
 C. D. }

The defendant comes and moves the court to arrest the judgment herein, for the reasons following :

1. Because, [&c.]

J. S., Attorney for Defendant.

[Date.]

When a judgment is arrested the defendant recovers his costs.*

Form of Journal entry overruling the Motion in Arrest of Judgment.

A. B. }
 v. }
 C. D. }

This cause came on [again] to be heard upon the motion of the defendant to arrest the judgment, on the verdict rendered herein ; on consideration whereof,* it is ordered that said motion be overruled.

Form of Journal entry Sustaining the Motion.

*As in the preceding to the *, and then as follows :*] and the court being of the opinion that no judgment can or ought to be rendered on said verdict, it is ordered that judgment herein be and the same is arrested. It is therefore considered, that the defendant go hence and recover of the plaintiff his costs herein, taxed to — dollars — cents.

 SEC. IV. MOTION FOR REPLEADER.

When a plea or replication is good in substance, and some immaterial part of it is traversed, leaving the main fact unfound by the jury, the verdict is found upon an immaterial issue. In such case, and in all cases where the issue is of such a nature that the court can give no judgment upon it, the party against whom the verdict is rendered may move the court for a repleader, that is, order the parties to plead anew, beginning at the first fault which occasioned the immaterial issue.

Motion for Judgment Non Obstante Veredicto.

The distinction between a repleader and a judgment non obstante veredicto, with which it has been sometimes confounded, is this: A judgment non obstante veredicto will be given where the plea or replication is good in form, but sets up matter that constitutes neither bar nor answer, and issue is taken on it and it be found true by verdict, it still leaves the cause of action or bar unanswered and confessed, because the fact plead and found is itself no bar; so that, repleading the matter in any way would not, upon the party's own showing, mend the case or the merits. But where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment; or, where the matter is good, but so defectively or informally stated that an immaterial issue is made, a repleader will be ordered.

A judgment, therefore, non obstante veredicto is always on the merits; a repleader is upon the form and manner of pleading.⁷

Thus, where in an action of assumpsit against an executor as executor, he pleads that he himself, instead of the testator, made no such promise, the court will award a repleader. On the other hand, where in a suit on a written contract, which is barred after fifteen years, if the defendant plead that the cause of action did not accrue within *six* years, and issue is taken thereon, the court will give judgment non obstante veredicto.⁸

SEC. V. MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO.

In the preceding remarks, in relation to a repleader, the general nature of this judgment is stated.

Where the defence put upon the record is not a legal defence to the action in point of substance, (as a plea in confession and avoidance, bad in point of law, and might have been demurred to but issue is taken upon it,) and a verdict has been given for the defendant, the plaintiff may move the court for judgment, *notwithstanding the verdict* (non obstante veredicto).⁹

And where one of several issues is found for the defendant, but the issue so found does not go to the merits of the action, judgment will be rendered for the plaintiff if the other issues are found for him.¹⁰

When a judgment non obstante veredicto is rendered for the plaintiff, an inquiry of damages is usually had by a jury; but if the jury has already passed upon it, and assessed damages upon the matter for which the plaintiff is entitled to judgment, no inquiry need be had, but judgment will be rendered for the plaintiff for the damages assessed.¹¹

(y) 2 Hill, 86; 14 Ohio Rep. 204; 16 Johns. 227; Tidd, 922. (z) 15 Ohio Rep. 180.

(b) 12 Wend. 475.

(a) 14 Ohio Rep. 204; 17 Ohio Rep. 454; 15 Ohio Rep. 130; 2 Hill, 86; 2 Arch. 261; Steph. Pl. 97.

(c) Likes v. Van Dike, 17 Ohio Rep. 454.— This case does not seem to be fully reported. It is said that a plea of *moliter manus imposuit* is not a full answer to a declaration, charging an

 Motion for Judgment Non Obstante Verdicto.

The court do not grant this motion unless the merits of the case are clear.^d
 The defendant cannot make the motion.^e

assault and battery. What was complained of in the declaration is not reported, but simply that it was an action of trespass, and that the defendant plead that he was lawfully possessed of a farm, and that the plaintiff unlawfully entered upon the same, and commenced throwing down the fences, &c., and that the defendant requested him to desist, and gently laid hands upon him, to prevent him from further mischief; without averring that any further injury to the plaintiff resulted from his own improper resistance. The trespass of the plaintiff stated in the plea, was a sufficient justification for the defend-

ant to lay his hands on him; and such laying on of hands, however *gently*, is a technical assault and battery. From this and from the general reasoning of the court, it is very evident that the declaration contained charges going altogether beyond a mere technical assault and battery; and these other charges were the subject matter of the decision, to wit: bruised, wounded, knocked down, &c.

(d) 2 Arch. Pr. 261.

(e) 1 Hall, 636; 2 Hill, 86; 4 Wend. 468; 5 Id. 518.

CHAPTER XXI.

VERDICTS, JUDGMENTS, &c., IN ASSUMPSIT.*

SECTION I. GENERAL DIRECTIONS AS TO THE FORM OF VERDICTS AND JUDGMENTS.

II. VERDICTS AND JUDGMENTS FOR THE PLAINTIFF IN ASSUMPSIT.

1. Judgment by Confession on a Warrant of Attorney.
2. Judgment by Default, damages assessed by the Court.
3. Verdict and Judgment for the Plaintiff, on Submission to the Court to try the issue, and to assess damages.
4. Verdict and Judgment for Plaintiff on Non Assumpsit — Bill of Exception — Motion for New Trial overruled — Exception — Judgment.
5. Verdict and Judgment for Plaintiff on Non Assumpsit and Notice of Set Off.
6. Skeleton form — Trial by Jury — Adjournment from day to day — Motion by Defendant for a Nonsuit — Motion overruled — Exceptions — Verdict for Plaintiff — Motion for a New Trial — Motion overruled — Exceptions — Motion in Arrest of Judgment — Motion overruled — Judgment for Plaintiff.
7. Verdict and Judgment for Plaintiff on Non Assumpsit and Notice of Set Off, finding a part of the Set Off.
8. Verdict and Judgment for Plaintiff upon plea of Non Assumpsit as to Part, and Tender as to Residue.
9. Verdict and Judgment for Plaintiff upon the General Issue and Plea of Infancy.
10. Verdict and Judgment on Default — Damages assessed by a Jury.
11. Verdict and Judgment for Plaintiff against two Defendants, where one Pleads and the other makes Default — Damages assessed by the Court.

(a) For the forms of Verdicts and Judgments where there is a demurrer to be disposed of, or an inquiry of damages upon demurrer overruled or sustained, see ante, p. 835.

Some of the short forms given in other portions of this volume to illustrate the text, are

inserted in this chapter for ready reference. The reader will also find some repetitions in these forms, but this was done advisedly, that the draftsman might not be wearied by a reference to one form, to fill up a blank in another.

12. The like — Damages assessed by a Jury.
13. Verdict and Judgment for Plaintiff where one issue is found for the Plaintiff and another for the Defendant.
14. Verdict and Judgment for Plaintiff when issue is taken on a Plea that the money paid into Court is sufficient to pay all Damages.
15. Verdict and Judgment for Plaintiff against an Administrator on Non Assumpsit, with Costs.
16. Judgment by Default on Proclamation.
17. Judgment for Plaintiff on Replication of Nul tiel record.
18. Judgment for Plaintiff on Plea of Nul tiel record.
19. Judgment for the Plaintiff on a Demurrer to the Evidence.
20. Judgment for the Plaintiff by Cognovit — Relicta, Verification — Nil dicit — and Non sum informatus.
21. Suggestion of the Death of one of the Defendants after verdict and before judgment, and Judgment on the Verdict.
22. Verdict and Judgment for Plaintiff upon a Plea in Abatement.

III. VERDICTS, JUDGMENTS, ETC., FOR THE DEFENDANT, IN ASSUMPSIT.

1. Verdict and Judgment for Defendant on plea of Non Assumpsit.
2. Verdict and Judgment for Defendant upon several issues, (Infancy of Defendant — the Goods Necessaries — Confirmation of promise.)
3. Verdict and Judgment for Defendant on General Issue and Notice of Set off — balance found in favor of the Defendant.
4. Verdict for one Defendant on Non Assumpsit, where another has let judgment go by Default — Judgment for both Defendants.
5. Verdict and Judgment for Defendant, an Administrator, on Plea of Non Assumpsit of Intestate.
6. Verdict and Judgment for Defendant where one Issue is found for the Plaintiff and another for the Defendant.
7. Verdict and Judgment for Defendant upon a Plea in Abatement.
8. Special Verdict and Special case, with Judgment thereon for the Defendant.
9. Nonsuit for want of a declaration.
10. Nonsuit for want of a Replication.

 General Directions as to the Form of Verdicts and Judgments.

11. Voluntary Nonsuit before Trial.
12. Jury sworn — Voluntary Nonsuit of Plaintiff, and Judgment for the Defendant.
13. Jury Sworn — Nonsuit by Order of the Court.
14. Jury Sworn — Juror withdrawn by Consent — Judgment of Nonsuit.
15. Judgment for the Defendant on Demurrer to the Evidence.
16. Judgment for Defendant on Discontinuance.
17. Judgment for Defendant on Nolle Prosequi. Ante, p. 901.
18. Judgment for Defendant on Nolle Prosequi to one or more Counts. Ante, p. 901.
19. Judgment for Defendant on Plea of Nul tiel record.
20. Verdict set aside and new trial granted.
21. Verdict and Judgment for Defendant where issue is taken on a Plea that the money paid into Court is sufficient to pay all Damages.
22. Verdict for Defendant upon Plea of Tender as to part, and General Issue as to the residue; and Judgment thereon.

 IV. COMPLETE RECORD IN COMMON PLEAS.

SEC. I. GENERAL DIRECTIONS AS TO THE FORM OF VERDICTS AND JUDGMENTS.

The verdict, as announced by a jury is not, in general, in the form required, but is put into form when entered by the clerk in the journal of the court.*

The jury, before they can render a verdict in favor of a party, must find the questions made by the pleadings in his favor; and the verdict when put into form, asserts either negatively or affirmatively, that the questions made by the pleadings, are one way or the other. Thus, if the issue be whether the defendant did or did not promise, as set forth in the declaration, (*non assumpsit*), and the jury find a verdict for the plaintiff, the clerk, in entering the verdict, states, specifically, that the jury found "that the defendant *did* assume and promise in manner and form as the plaintiff hath complained against him."— And if the verdict upon such an issue be in favor of the defendant, then the clerk in the journal entry, states that the jury found "that the defendant did *not* assume and promise, in manner and form as the plaintiff hath complained against him." But there may be, and generally are, several issues made by the pleadings; and then, the jury must pass upon all the issues; and the verdict, as entered, must affirm or deny the truth of each issue. Thus, the defendant

(a) See ante, p. 919.

General Directions as to the form of Verdicts and Judgments.

may have pleaded non assumpsit, and the statute of limitations, and given notice of set off. In such case, the verdict must be entered on the journal, affirming or denying, specifically, each of these issues, and if in favor of the plaintiff, thus: "that the defendant did assume and promise in manner and form as the plaintiff hath complained against him; and that the several causes of action in the declaration mentioned, did accrue to the plaintiff within [six] years next before the commencement of this suit, as the plaintiff hath alleged; and the jury aforesaid do further find that the plaintiff was not indebted to the defendant in manner and form as the defendant hath, in his notice of set off, in that behalf, alleged."

It will be perceived that the object of calling a jury is, not only to decide the amount of indebtedness or the damages, but to also determine questions of fact, which are disputed or put in issue by the pleadings; and that the form of the verdict upon the questions of fact, varies in each case according to the issues made by the pleadings. It is, therefore, necessary for the clerk, before entering the verdict upon the journal, to look into the pleadings, and to shape the verdict so as to conform to the issues there made.

All the issues made up in the case, must be found one way or the other by the jury, else error will lie.^b

The clerk will find little and perhaps no difficulty in finding language to express, properly, in the verdict, the exact affirmative or negative of the issues; for the verdict should be, in general, in the substantive words of the issues.—Thus, suppose the defendant pleads the statute of limitations, and the plaintiff replies that the defendant was out of the State, and that the plaintiff sued within six years next after the defendant's return. To this replication the defendant takes *issue* by way of Rejoinder. This rejoinder would be "that the plaintiff did not within six years next after the defendant's return into the State of Ohio, commence his action aforesaid against him, the said defendant, in manner and form as the plaintiff hath in his said replication alleged; and of this he puts himself upon the country; and the plaintiff doth the like," &c.

Now the verdict for the plaintiff under this issue would state that the jury found "that the plaintiff did,* within six years next after the defendant's return into the State of Ohio, commence his action aforesaid against the defendant in manner and form as the plaintiff hath in his said replication alleged."

If the verdict, however, upon this issue, was for the defendant, then it would be in precisely the same form, except that at the * the word *not* would be inserted.

It may be proper to state in this connection, that whenever a plea, replication, or other pleading, concludes to the country, thus, "and of this he puts himself upon the country," it contains one of the issues to be tried by the jury, and upon which the jury pass; unless, indeed, it has been withdrawn by leave of the court, or, by special order of the court otherwise disposed of.

The clerk must necessarily examine the pleadings before he enters the verdict upon the journal.

(b) 6 Ohio Rep. 521; 9 Ohio Rep. 131; 7 Ohio Rep. (part 2,) 232.

General Directions as to the form of Verdicts and Judgments.

He will avoid mistakes if he will select from the pleadings such of them as conclude to the country, together with the notice of special matter: for these will give him the form of the verdict so far as the issue is concerned. Thus, if the pleadings consist of,

1st, General issue—non assumpsit—which always concludes to the country.

2d, Plea of the statute of limitations.

3d, Replication that defendant was out of the State and sued within six years after his return.

4th, Rejoinder by defendant, that plaintiff did not sue within six years after his return, concluding to the country.

5th, Notice of set off.

Here the clerk in making up the form of the verdict for the journal would affirm or negative substantially: 1st, The general issue. 2d, The rejoinder to the country. And, 3d, The notice of set off.

In Assumpsit, Debt, Covenant, Trespass, Libel and Slander, Trover and Case, if the verdict of the jury is for the defendant, the clerk's entry of the verdict is complete after he has entered the finding of the jury upon the pleadings; unless, indeed, the jury find, under a notice of set off, in assumpsit, debt, or covenant, that the plaintiff owes the defendant.

If the verdict, however, is in favor of the plaintiff, on the pleadings, the remaining part of the verdict, (being the debt or damages found in his favor,) is entered.

This part of the verdict is always the same in Assumpsit, Covenant, Trespass, Libel and Slander, Trover and Case. Indeed in all actions (except Debt and Replevin,) the verdict and judgment is for damages, and the form of the verdict as to the damages, and the form of the judgment, is, in general, the same in all these actions.

The form, therefore, of that part of the verdict which finds the damages, is, in Assumpsit, Covenant, Trespass, Libel and Slander, Trover and Case, generally, thus: "and they assess the damages of the plaintiff by reason thereof, to — dollars."

In Debt, the jury in general assess damages to the plaintiff, either for the detention of the debt or on the breaches assigned. The form of the entry is given in the next chapter. The form of the entry in Replevin is also given in a subsequent chapter.^c

If there have been, during the progress of the trial, exceptions taken to the decisions of the court, or to the charge of the court, a minute of the fact may be inserted after the entry of the verdict, thus:^d

(c) Post chap. 26.

(d) In some of the circuits Bills of Exceptions are not made a part of the record by an express journal entry, but the bills of exceptions are supposed to be a part of the record by being sealed by the court and filed. Unwilling to add anything to the labor of clerks which might be

unnecessary, I consulted the Chief Justice of the Supreme Court as to the necessity or propriety of noticing the bill of exceptions in the journal of the court. He recommended that it should be noticed, although the Supreme Court have not in practice absolutely required it.

Judgment by Confession.

"Bills of Exception signed and sealed by the court on the trial and filed herein, are made part of the record."

The motion for a new trial is next entered, and if overruled, and the party excepts to the decision, the exception is noticed thus :

"To the overruling said motion the [defendant] excepted, and the court signed and sealed a bill of exceptions which is filed herein and made a part of the record."

Next follows the motion in arrest of judgment and its disposition, and then the judgment.

The judgment, if the verdict be for the plaintiff, is, generally, in Assumpsit, Covenant, Trespass, Libel and Slander, Trover and Case, in the form following :

"Therefore, it is considered that the plaintiff recover of the defendant the said sum of — his damages aforesaid assessed, and also his costs herein taxed to — dollars, — cents.

If the verdict be for the defendant it is generally in assumpsit, as well as in all other actions except replevin in the form following :

"Therefore it is considered that the defendant go hence without day and recover of the plaintiff his costs, herein taxed to — dollars — cents."

It will be seen from what has been said, that the entry of the verdict and judgment in the different actions are very much alike and the whole is entered in the following order :

I. The empanelling and swearing the jury. The form of this entry is generally the same in all actions.

II. The verdict of the jury upon the issues or pleadings. This always varies according to the pleadings.

III. The assessment of damages by the jury. This only occurs when the verdict is for the plaintiff, and its form is substantially the same in all actions except Debt and Replevin.

IV. If there be no exceptions, motion for new trial or motion in arrest of judgment, the judgment of the court on the verdict is entered. The form of this judgment, except in Debt and Replevin, is generally the same in all actions.

1. *Judgment by Confession on Warrant of Attorney.*

A. B. }
 v. }
 C. D. } In Assumpsit.

This day came into court A. B. by Mr. O. his counsel, and filed his declaration against the said C. D., and thereupon E. F., one of the attorneys of this court, appeared in open court in behalf of the said C. D., and *by virtue of a warrant of attorney for that purpose executed by the said C. D. and now produced in open court and duly proved*, waived the issuing and service of

For Plaintiff.

process, and acknowledged that the said C. D. did assume and promise in manner and form as the said A. B. hath in his said declaration alleged against him, and confessed that the said A. B. hath sustained damages by reason thereof to — dollars; Therefore it is considered, that the said A. B. recover of the said C. D. the sum of — dollars his damages so confessed as aforesaid, and also his costs in this behalf expended, taxed to — dollars. And by virtue of the same warrant of attorney, all error and writs of error in the premises, are released.

2. *Judgment by Default—Damages assessed by the Court.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the plaintiff, by his attorney, and the said defendant, though called, came not, but made default; whereupon it is considered that the plaintiff ought to recover his damages in the premises; and neither party requiring a jury, the court assess the damages aforesaid to — dollars. Therefore it is considered that the plaintiff recover of the defendant his damages aforesaid, assessed, and also his costs herein taxed to — dollars — cents.

3. *Verdict and Judgment for the Plaintiff on Submission to the Court to try the Issue and to Assess the Damages.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and submit this cause to the court upon the issue joined between the parties, and the court being fully advised in the premises, do find that the said C. D. did assume and promise in manner and form as the said A. B. hath complained against him, and they assess the damages of the said A. B. by reason thereof, to — dollars; Therefore it is considered, that the said A. B. recover of the said C. D. the said sum of — dollars, his damages aforesaid assessed, and also his costs in this behalf expended, taxed to — dollars.

4. *Verdict and Judgment for Plaintiff on Non Assumpsit — Bills of Exception — Motion for New Trial overruled — Exceptions — Judgment.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and thereupon came a jury,

For Plaintiff.

to wit, E. F., [&c.,] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the defendant did assume and promise in manner and form as the plaintiff hath complained against him, and assesses the damages of the plaintiff by reason thereof, to — dollars.

Bills of exceptions to the ruling of the court on the trial, and to the charge of the court, signed and sealed by the court, and filed herein, are made a part of the record.

The defendant moved the court to set aside said verdict, and for a new trial, for reasons on file; which motion being heard, on consideration thereof, it is ordered, that said motion be and the same is overruled.

For overruling said motion, the defendant excepted, and a bill of exceptions in that behalf, signed and sealed by the court, and filed herein, is made a part of the record.

And now it is considered by the court, that the plaintiff recover of the defendant said sum of — dollars, his damages aforesaid, assessed, and also his costs herein taxed to — dollars — cents.

5. *Judgment and Verdict for Plaintiff on Non Assumpsit and Notice of Set off.*

A. B. }
v. } In Assumpsit.
C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit, E. F., [&c.,] who being empanelled and sworn the truth to speak upon the issues joined between the parties, upon their oaths do say, that the defendant did assume and promise in manner and form as the plaintiff hath complained against him, and assess the damages of the plaintiff, by reason thereof, to — dollars; and the jury aforesaid do further say, that the plaintiff was not indebted to the defendant in manner and form as the defendant hath in his notice of set off in that behalf alleged. Therefore it is considered, that the plaintiff recover of the defendant said sum of — dollars, his damages aforesaid assessed, and also his costs herein taxed to — dollars.

6. *Skeleton form—Trial by Jury—Adjournment from day to day—Motion by Defendant for a Nonsuit—Motion overruled—Exceptions—Verdict for Plaintiff—Motion for New Trial—Motion overruled—Exceptions—Motion in Arrest of Judgment—Motion overruled—Judgment for Plaintiff.*

A. B. }
v. } In Assumpsit.
C. D. }

This day came the parties by their attorneys, and also came a jury, to wit,

For Plaintiff.

E. F., [&c.,] who were empanelled and sworn the truth to speak upon the issue joined between the parties, and the evidence not being closed, were adjourned until to-morrow morning at 9 o'clock.

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came again the parties by their attorneys, and also came the jury empanelled and sworn herein on yesterday, and further evidence being heard by the court and jury, and the plaintiff having closed his testimony and rested his case; thereupon the defendant moved the court to direct a nonsuit, by reason that the matters aforesaid, so given in evidence by the plaintiff, do not support the case set forth in the declaration, which motion being considered, the court overrule the same. For overruling said motion, the defendant excepted, and a bill of exceptions in that behalf, signed and sealed by the court, and filed herein, is made a part of the record. The defendant then adduced evidence to the court and jury, and the evidence not being closed, were adjourned until to-morrow morning at 9 o'clock.

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came again the parties by their attorneys, and also came the jury empanelled and sworn herein, on [Tuesday,] and the jury, upon their oaths, do say, that, [&c. : *here enter the verdict.*]

[Bills of exception to the ruling of the court on the trial, and to the charge of the court, signed and sealed by the court and filed herein, are made a part of the record.]

The defendant moved the court to set aside said verdict, and for a new trial, for reasons on file.

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came again the parties by their attorneys, and the motion heretofore made in this cause to set aside the verdict, and for a new trial, was heard by the court; on consideration whereof it is ordered, that said motion be and the same is overruled. For overruling said motion the defendant excepted, and a bill of exceptions on that behalf, signed and sealed by the court, and filed herein, is made a part of the record.

The defendant moved the court to arrest the judgment herein, for reasons on file.

For Plaintiff.

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came again the parties by their attorneys, and the motion heretofore made in this cause to arrest the judgment on the verdict rendered herein, was heard by the court; on consideration whereof, it is ordered, that said motion be overruled;* whereupon it is considered, that the plaintiff recover of the defendant said sum of — dollars, his damages aforesaid, assessed, and also his costs herein taxed to — dollars — cents.

7. *Verdict and Judgment for Plaintiff on Non Assumpsit, and Notice of Set Off, finding a part of the Set Off.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit, E. F., [&c.,] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the defendant did assume and promise in manner and form as the plaintiff hath complained against him, and assess the damages of the plaintiff by reason thereof, to [six hundred] dollars; and the jury do further say, that the said plaintiff is indebted to the said defendant in the sum of [two hundred] dollars, parcel of the moneys demanded by said defendant in his notice of set off; and thereupon the jury do find, after deducting said last mentioned sum from the damages aforesaid, there is a balance due the plaintiff from the defendant, of [four hundred] dollars, damages. Therefore it is considered, that the plaintiff recover of the defendant said sum of [four hundred] dollars, his damages found as aforesaid, and also his costs, herein taxed to — dollars — cents.

8. *Verdict and Judgment for the Plaintiff upon plea of non-assumpsit as to part and tender as to residue.**

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit: E. F., [&c.] who, being empaneled and sworn the truth to speak upon the issues joined between the parties, upon their oaths do say, that the defendant did assume and promise in manner and form as the plaintiff hath declared against him; and they assess the damages of the plaintiff by reason of the

(a) The decision in 16 Ohio Rep. 457, seems to point out this form of the entry.

For Plaintiff.

premises to [five hundred] dollars : and they do further find that the defendant did tender to the plaintiff the sum of [threehundred] dollars, parcel of and less than the said damages assessed as aforesaid. It is therefore considered by the court, that the plaintiff recover of the defendant the said sum of [five hundred] dollars, the damages aforesaid assessed, and also his costs herein taxed at — dollars. And it is ordered, that the plaintiff take said three hundred dollars tendered as aforesaid, and that the same be credited on execution issued in this case.

9. *Verdict and Judgment for Plaintiff upon the general Issue and Plea of Infancy, and Notice of Set-Off.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit : E. F., [&c.] who, being empanelled and sworn the truth to speak upon the issues joined between the parties, upon their oaths do say, that as to the first issue joined between the parties, the defendant did assume and promise, in manner and form as the plaintiff hath complained against him ; and as to the second issue joined between the parties, the jury aforesaid say, that at the time of the making of the said several promises in the declaration mentioned, the defendant was not within the age of twenty-one years, in manner and form as he hath alleged ; and as to the notice of set-off, the jury aforesaid say, that the plaintiff was not indebted to the defendant in manner and form as the defendant hath alleged ; and the said jury assess the damages of the plaintiff by reason of the defendant not performing the promises above mentioned, to — dollars. Therefore it is considered, that the plaintiff recover of the defendant said sum of — dollars, his damages aforesaid assessed, and also his costs herein taxed to — dollars.

10. *Verdict and Judgment for Plaintiff on Default — Assessment of damages by a Jury.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the plaintiff, and the defendant, though called, came not, but made default ; whereupon it is considered, that the plaintiff ought to recover his damages by reason of the premises, and the plaintiff [*or say defendant, as the case may be,*] demanded a jury to assess the damages aforesaid ;* and a jury being called, came, to wit : E. F., [&c.] who, being empanelled

For Plaintiff.

and sworn well and truly to assess the damages aforesaid, assessed the same to — dollars. Therefore it is considered, that the plaintiff recover of the defendant said sum of — dollars, his damages aforesaid assessed, and also his costs herein taxed to — dollars.

The like upon a Judgment by Default at one term, and Damages assessed by a Jury at a subsequent term.

[At the first term, enter the judgment as in the last precedent to the *, and then say, "It is ordered that this cause be continued until next term for the assessment of said damages." At the term when the damages are assessed say, "This day came again the parties by their attorneys, and thereupon came a jury, to wit, E. F., [&c.] who, being empannelled and sworn well and truly to assess the damages sustained by the said A. B. by reason of the non-performance of the promises of the said C. D. in the said declaration mentioned, do assess the same to — dollars. Therefore, [&c., as in the preceding form.]

11. *Verdict and Judgment for Plaintiff against two Defendants when one pleads, and the other makes Default — Damages assessed by the Court.*

A. B.
v.
C. D. & E. F. } In Assumpsit.

This day came the said A. B. by his attorney, and the defendant C. D., though solemnly called, came not, but made default; whereupon it is considered, that the said A. B. ought to recover his damages against the said C. D. by reason of the premises, and neither party requiring a jury, the Court do assess the same to — dollars; and thereupon came the defendant E. F., and this cause was submitted to the Court by the said A. B. and the said E. F. upon the issue therein joined between them, and the Court being fully advised in the premises, and neither party requiring a jury, do find that the said E. F. did assume and promise in manner and form as the said A. B. hath complained against him, and they assess the damages of the said A. B. by reason thereof, to the sum of — dollars. Therefore it is considered, that the said A. B. recover of the said C. D. and E. F. the said sum of — dollars, his damages aforesaid assessed, and also his costs herein taxed to — dollars.

For Plaintiff:

12. *Verdict and Judgment for Plaintiff against the Defendant when one Pleads Non-Assumpsit and the other makes Default— Damages Assessed by a Jury.*

A. B. }
v. } In Assumpsit.
C. D. & E. F. }

This day came the said A. B. by his attorney, and also the said C. D. by his attorney, and the said E. F., though solemnly called, came not, but made default, whereupon it is considered, that the said A. B. ought to recover his damages against the said E. F. by reason of the premises, and thereupon came a jury, to wit, G. H., [&c.] who, being empanelled and sworn the truth to speak upon the issue joined between the said A. B. and the said C. D. and also well and truly to assess the damages sustained by the said A. B. by reason of the non-performance of the promises of the said C. D. and E. F. in the declaration mentioned, upon their oaths do say, that the said C. D. did assume and promise in manner and form as the said A. B. hath complained against him; and they assess the damages of the said A. B. by reason of the not performance of the promises in the declaration mentioned, as well against the said C. D. as against the said E. F., to — dollars. Therefore, [&c., as in the preceding form.]

13. *Verdict and Judgment for Plaintiff, where one Issue is found for the Plaintiff and another for the Defendant.*

A. B. }
v. } In Assumpsit.
C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit: E. F., [&c.] who being empanelled and sworn the truth to speak upon the issues joined between the parties, upon their oaths do say, that as to the [first] issue joined between the parties, the said defendant did assume and promise in manner and form as the said plaintiff hath in the [first] and [second] counts of his declaration alleged, and they assess the damages of the said plaintiff, by reason of not performing the promises in said counts mentioned, to — dollars. And as to the issues joined between the parties upon the [third] and [fourth] counts of said declaration, the jury aforesaid say, that the said defendant did not, within six years next before the commencement of this suit, assume and promise in manner and form as the said plaintiff hath in said [third] and [fourth] counts of his said declaration complained against him. Therefore it is considered, that the plaintiff recover of the defendant the said sum of — dollars, his damages aforesaid assessed, and also his costs in that behalf expended, taxed to — dollars; and that the plaintiff take nothing for his false claim, whereof the defendant is, by the said jury as aforesaid, acquitted; and let the defendant go thereof without day.

* For Plaintiff.

14. *Verdict and Judgment for Plaintiff where Issue is taken on a Plea that the Money paid into Court is sufficient to pay all Damages.**

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit: E. F., [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the said plaintiff hath sustained damages [*or in Debt*, that the defendant was and is indebted to the plaintiff] to a greater amount than the said sum of [*here insert the amount paid in, as thus*, three hundred] dollars, in respect to the causes of action in the declaration mentioned, to wit, to the amount of *four hundred* dollars. It is therefore considered by the court, that the plaintiff take said sum so paid in, and as to the balance of said damages [*or if in Debt, say debt*] found by the jury, to wit, *one hundred* dollars; that the plaintiff recover the same of the defendant, together with his costs herein remaining unpaid, taxed to — dollars — cents.

15. *Verdict and Judgment for Plaintiff against an Administrator on Non Assumpsit, with Costs.*

A. B. }
 v. } In Assumpsit.
 C. D., Adm'r of E. F. }

This day came the parties by their attorneys, and thereupon came a jury, to wit: G. H., [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the said E. F., in his lifetime, did assume and promise in manner and form as the said plaintiff hath in that behalf alleged, and they assess the damages of the plaintiff, by reason thereof, to — dollars: Therefore it is considered, that the plaintiff recover of the said C. D., as administrator of the said E. F. deceased, the said sum of — dollars, his damages aforesaid assessed. And it appearing to the court that the demand upon which this action is founded, was presented to said defendant within one year after he gave his administration bond for the discharge of his trust, and [that its payment was unreasonably neglected, *or say* that the defendant refused to refer the same, as provided by the act entitled an act to provide for the settlement of the estates of deceased persons.] It is further considered by the court, that the plaintiff recover of the defendant [as administrator as aforesaid] his costs herein, taxed at — dollars: the said damages [and costs] to be levied of the goods and chattels which were of the

For Plaintiff.

said E. F. at the time of his death, and in the hands of the said E. F. unadministered.*

*If the court direct that the costs shall be paid by the administrator out of his own property, then omit the words "as administrator as aforesaid" and "and costs," in the above form, and add the following at the *: and that the said costs be levied of the proper goods and chattels, lands and tenements of the said defendant.**

16. *Judgment for Plaintiff by Default on Proclamation.*

A. B. }
 v. }
 C. D. } In Assumpsit.

On this day, to wit, — day of —, A. D. 18—, came again the said plaintiff by his attorney, and it appearing to the satisfaction of the court that proclamation, as herein before ordered, has been duly issued and published, warning the said defendant to appear here this day in open court, and the defendant being now three times solemnly called, appeared not, but made default: Whereupon it is considered, that the said plaintiff ought to recover his damages against the defendant, by reason of the premises; and neither party requiring a jury, and the court being fully advised in the premises, do assess said damages to — dollars. Therefore it is considered, that the plaintiff recover of the defendant the said sum of — dollars, his damages aforesaid assessed, and also his costs herein expended, taxed to — dollars.

17. *Judgment for Plaintiff on Replication of Nul tiel record.*

A. B. }
 v. }
 C. D. } In Assumpsit.

This day came the said A. B. by his attorney, and the said C. D., though solemnly demanded to appear and produce the record by him in pleading alleged, comes not, nor produces the same, but therein makes default: whereupon it is considered, that the said A. B. ought to recover his damages by reason of the premises; and neither of the parties requiring a jury, the court being fully advised, &c. [*Conclude as in No. 2, ante 939. Or in Debt, enter final judgment at once: Therefore, it is considered, that the said A. B. recover of the said C. D. his said debt, and also — dollars for his damages which he has sustained, on occasion of the detaining the said debt, and also his costs herein taxed to — dollars.*]

(a) No judgment for costs is rendered if the demand upon which the suit is founded was not presented to the executor or administrator with-
 in one year after his giving bonds. See, as to costs, Swan's Stat. 355, sec. 96; 378, sec. 208; 380, secs. 220, 224.

For Plaintiff.

18. *Judgment for Plaintiff on Plea of Nul tiel record.*

A. B. }
 v. }
 C. D. } In Assumpsit.

This day came the parties by their attorneys, and thereupon the record aforesaid being seen and inspected by the court, it sufficiently appears, that there is such a record of recovery against the said C. D. at the suit of the said A. B. as the said A. B. hath alleged: whereupon it is considered, that the said A. B. ought to recover, &c. [*Conclude as in No. 2, ante 939, or, if the damages be assessed by a jury, conclude as in No. 10, ante p. 944.*]

19. *Judgment for the Plaintiff on Demurrer to Evidence.**

A. B. }
 v. }
 C. D. } In Assumpsit.

This day came the parties by their attorneys and this cause came on to be heard upon the demurrer of the plaintiff to the evidence of the defendant, and the premises being argued, and the court fully advised, are of the opinion that the matter to the jury aforesaid, in form aforesaid, shown in evidence by the defendant, is not sufficient in law to bar the action of the plaintiff, and that the plaintiff ought to recover his damages in the premises; and neither party requiring a jury, and the court being fully advised in the premises, do assess the plaintiff's damages at — dollars: Therefore it is considered, that the plaintiff recover of the defendant the said sum of — dollars, his damages aforesaid, assessed, and also his costs herein taxed to — dollars.

If the defendant demurred to the evidence of the plaintiff, follow the form, post, section III, page 956, form No. 15, to the star in that form, and then proceed as follows: is sufficient in law to maintain the issue joined between the parties: Therefore it is considered, that the plaintiff recover of the defendant the said sum of — dollars, the damages aforesaid assessed, and also his costs herein taxed to — dollars.

20. *Judgment for Plaintiff by Cognovit — Relicta verificatione — Nil dicit — and Non sum informatus.*

A. B. }
 v. }
 C. D. } [In Assumpsit.]

By Cognovit.

This day came the parties by their attorneys, and thereupon the said C. D. relinquishing his plea, says that he cannot deny the action of the said A. B.

.(a) For the form of the entry of the Demurrer and joinder see ante p. 936.

For Plaintiff.

nor the causes thereof, in manner and form as the said A. B. hath complained against him, and confesses that, [the said A. B. hath sustained damages by reason of the premises, to — dollars, *or in debi say* he owes the said A. B. — dollars, and that the said A. B. hath sustained — dollars damages by reason of the detention thereof:] Therefore it is considered, that the said A. B. recover of the said C. D. the said sum of — dollars, his [&c.] as aforesaid confessed, and also [&c.]

By Nil dicit.

This day came the plaintiff, and the said C. D. in his proper person, *or* by G. H. his attorney, comes and defends, &c., and says nothing in bar or preclusion of the said action of the said A. B. whereby the said A. B. remains therein undefended against the said C. D., and thereupon it is considered, that the said A. B. ought to recover, [&c. *Conclude as in* No. 2, ante p. 939.

By Non sum informatus.

This day came the plaintiff, and the said C. D. by G. H. his attorney, comes and defends, &c., and the said A. B. prays that the said C. D. may answer his said declaration; whereupon the said attorney of the said C. D. says that he is not informed by the said C. D. of any answer to be given for him to the said A. B. in the premises, nor doth he say any thing in bar or preclusion of the said action of the said A. B. whereby the said A. B. remains therein undefended, [&c. *As before.*

21. *Suggestion of the death of one of the Defendants after Verdict and before Judgment, and Judgment on the Verdict.*

A. B.	}	In Assumpsit.
v.		
C. D. and E. F.		

Enter the Verdict in the usual way.]—And upon this the said A. B. gives the court here to understand and be informed, that after the last continuance of this cause, and before this day, to wit, on — the said E. F. died, to wit, at —, and the said C. D. then and there survived, which the said C. D. doth not deny, but admits the same to be true; therefore let all further proceedings in this cause against the said E. F. be stayed: whereupon the said A. B. prays judgment against the said C. D. of and upon the premises: Therefore it is considered, that the said A. B. recover of the said C. D. the said sum of — dollars, the damages aforesaid assessed, together with his costs herein taxed to — dollars.

For Defendant.

22. *Verdict and Judgment for Plaintiff upon a Plea in Abatement.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and also came a jury, to wit, [G. H. &c.] who being empanelled and sworn as well the truth to speak upon the issue joined between the parties, as to inquire of and assess the damages of the said A. B., by reason of the [not performing of the said several promises and undertakings, or according to the form of the action] in the declaration mentioned, in case the said issue shall be found for the said A. B., upon their oaths do say, that the said D. D. at the time of the suing out of the said writ in this behalf, was called and known as well by the name of C. D. as by the name of D. D., in manner and form as the said A. B. hath above in that behalf alleged; and they assess the damages of the said A. B. at — dollars. It is therefore considered, that the said A. B. recover of the said C. D. the said sum of — dollars, the damages aforesaid assessed, together with his costs herein, taxed to — dollars.

SEC. III. VERDICTS, JUDGMENTS, ETC., FOR THE DEFENDANT, IN ASSUMPSIT.

1. *Verdict and Judgment for Defendant on Plea of Non Assumpsit.*

A. B. }
 vs. } In Assumpsit.
 C. D. }

This day came the parties, by their attorneys, and thereupon came a jury, to wit: E. F., [&c.] who, being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say that the said defendant did not assume and promise in manner and form as the said plaintiff hath complained against him. Therefore it is considered, that the defendant go hence without day and recover of the plaintiff his costs herein taxed to — dollars.

2. *Verdict and Judgment for Defendant upon several Issues, (Infancy of Defendant—the Goods Necessaries—Confirmation of Promise.)*

A. B. }
 vs. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and also came a jury, to wit: E. F., [&c.] who, being empanelled and sworn the truth to speak upon the

For Defendant.

issue joined between the parties upon their oaths, do say that,* [*Here enter the verdict according to the pleadings, as thus:* As to the first issue joined between the parties, the defendant at the time of the making the several promises in the *first* and *second* counts of the declaration mentioned, was an infant within the age of twenty one years in manner and form as the defendant hath in that behalf alleged; and as to the *second issue* joined between the parties, the jury say that the goods and chattels in the *third* count of the declaration mentioned, were not necessary or suitable to the estate and degree of the defendant in manner and form as the plaintiff hath in that behalf alleged; and as to the *last* issue joined between the parties, the jury say that the defendant did not after he attained the age of twenty one years assent to, ratify, or confirm the several promises and undertakings in the *fourth* and *fifth* counts of the declaration mentioned, or any of them, in manner and form as the defendant hath in that behalf alleged.]

Therefore, it is considered, that the defendant go hence without day, and recover of the plaintiff his costs herein taxed to ——— dollars, ——— cents.

3. *Verdict and Judgment for the Defendant, on Notice of Set Off—Balance found in favor of the Defendant.*

*Follow the preceding form to the * and then proceed as follows:—* That the said C. D. did assume and promise in manner and form as the said A. B. hath complained against him, and do assess the damages of the said A. B. by reason thereof, to 300 dollars; and the jury do further say, that the said A. B. is indebted to the said C. D. in the sum of 800 dollars, parcel of the said several sums of money demanded by the said C. D. in his notice of set-off; and thereupon the jury do find that after deducting said damages from said last mentioned sum of 800 dollars, a balance of 500 dollars is due from the said A. B. to the said C. D. Therefore, it is considered, that the defendant recover of the plaintiff the said sum of 300 dollars, together with his costs herein taxed at ——— dollars.

4. *Verdict for one Defendant on Non Assumpsit, where another has let the Judgment go by Default—Judgment for both Defendants.*

This day came the said A. B. by his attorney, and also the said C. D. by his attorney, and the said E. F., though solemnly called, came not, but made default, whereupon it is considered, that the said A. B. ought to recover his damages against the said E. F. by reason of the premises; and thereupon came a jury, to wit: G. H., [&c.] who, being empanelled and sworn the truth to speak upon the issue joined between the said A. B. and the said C. D., and also well and truly to assess the damages sustained by the said A. B. by the non performance of the promises of the said C. D. and E. F. in the declara-

For Defendant.

tion mentioned, upon their oaths do say, that the said C. D. did not assume or promise in manner and form as the said A. B. hath declared against him ; and thereupon the said jury are discharged from inquiring against the said E. F. what damages the said A. B. hath sustained in the premises ; therefore, it is considered, that said C. D. & E. F. go hence without day, and recover of the said A. B. their costs herein taxed to ——— dollars.

5. Verdict and Judgment for Defendant, Administrator, on Non Assumpsit of Intestate.

A. B.
vs.
C. D., Administrator of G. H., deceased. } In Assumpsit.

This day came the parties by their attorneys, and also came a jury, to wit : E. F., [&c.] who, being empanelled and sworn the truth to speak upon the issue joined between the parties, do say* that the said G. H. in his lifetime did not assume and promise in manner and form as the plaintiff hath in that behalf alleged ; therefore, it is considered, that the defendant go hence without day, and recover of the plaintiff his costs herein taxed to ——— dollars, ——— cents.

6. Verdict and Judgment for Defendant, when one Issue is found for the Plaintiff and another for the Defendant.

*As in the preceding form to the * then proceed as follows :*]—that as to the first issue joined between the parties, the said C. D. did assume and promise in manner and form as the said A. B. in the first and second counts of his declaration hath alleged, and they assess the damages of the said A. B. by reason of the not performing the promises in the said first and second counts mentioned, to ——— dollars : And as to the last issue joined between the parties, the jury aforesaid, say, that the said C. D. did not within six years before the commencement of this suit assume or promise, in manner and form as the said A. B. hath in the third and fourth counts of the declaration complained against him : Therefore, it is considered, that the defendant go hence without day, and recover of the plaintiff his costs, herein taxed to ——— dollars.

7. Verdict and Judgment for the Defendant upon a Plea in Abatement.

A. B. }
vs. } In Assumpsit.
C. D. }

This day came the parties by their attorneys, and also came a jury, to wit :

For Defendant.

E. F., [&c.] who, being empanelled and sworn as well the truth to speak upon the issue joined between the parties, as to inquire of and assess the damages of the said A. B., by reason of the [not performing of the said several promises and undertakings, or, according to the form of the actions] in the declaration mentioned, in case the said issue shall be found for the said A. B., upon their oaths do say, that the said D. D. was not, at the time of the suing out of the said writ by the said A. B. in this behalf, nor hath he at any time hitherto, been called or known by the name of C. D. in manner and form as the said A. B. hath above alleged; therefore, it is considered, that the said writ of the said A. B. be quashed, and that the said D. D. go thereof without day, and recover against the said A. B. his costs herein taxed to — dollars.

8. *Special Verdict and Special Case, with Judgment thereon for the Defendant.*

A. B. }
vs. } In Assumpsit.
C. D. }

This day came the parties by their attorneys, and also came a jury, to wit: E. F., [&c.] who, being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that, [&c., stating the facts proved at the trial, with certainty and precision] -- But whether or not upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the [stating the substance of the issue joined, as thus: "the said J. S. be guilty of the trespass within specified,"] the jurors aforesaid are altogether ignorant; and therefore they pray the advice of the court; and if upon the whole matter aforesaid, it shall seem to the court [stating the affirmative of the issue, as thus: "that the said J. S. is guilty of the trespass aforesaid,"] then the jurors aforesaid, upon their oaths aforesaid, say [again stating the affirmative of the issue, "that the said J. S. is guilty thereof, in manner and form as the said I. N. hath above complained against him,"] and in that case they assess the damages of the said I. N. by reason thereof to — dollars: But if upon the whole matter aforesaid, it shall seem to the court [stating the negative of the issue, as thus: "that the said J. S. is not guilty of the trespass aforesaid,"] then the jurors aforesaid, upon the oaths aforesaid, say [stating again the negative of the issue, "that the said J. S. is not guilty thereof, in manner and form as the said I. N. hath above complained against him."]

Special Verdict, &c.

A. B. }
vs. } In Assumpsit.
C. D. }

On motion of the plaintiff, it is ordered that a day be given^a to the parties,

(a) See Swan's Stat. 671, § 100.

For Defendant.

until ——— to hear the judgment of the court in the premises, for that the court here are not yet advised thereof.

—————

A. B. }
 v. }
 C. D. } In Assumpsit. Special Verdict, &c.

This day [*the day named in the preceding order*] came again the parties by their attorneys, and the premises being seen and now fully understood, it is considered by the court that* the defendant go hence without day, and recover of the plaintiff his costs herein taxed to ———.

—————

9. *Nonsuit for want of a Declaration*

A. B. }
 v. }
 C. D. } In Assumpsit.

This day came the said C. D. by his attorney, and the the said A. B. having failed to declare against the said C. D., *according to the rules of court, or, as hereinbefore ruled to do*: Therefore it is considered, that the said C. D. go hence without day, and recover of the said A. B. his costs herein taxed to ——— dollars.

—————

10. *Nonsuit for want of a Replication.*

A. B. }
 v. }
 C. D. } In Assumpsit.

This day came the said C. D. by his attorney, and the said A. B. having failed to reply to the plea of the said C. D., *according to the rules of the court, or, as hereinbefore ruled to do*: Therefore it is considered, that the said C. D. go hence without day, and recover of the said A. B. his costs herein taxed to ——— dollars.

—————

11. *Voluntary Nonsuit before Trial.*

A. B. }
 v. }
 C. D. } In Assumpsit.

This day came the said C. D. by his attorney, and the said A. B. being solemnly called, came not, nor does he further prosecute his suit: Therefore it

For Defendant.

is considered, that the said C. D. go hence without day, and recover of the said A. B. his costs herein taxed to — dollars.

12. *Jury Sworn — Voluntary Nonsuit of Plaintiff and Judgment for Defendant.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit, E. F., [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, the said A. B., thereupon, fails to further prosecute his suit against the said C. D., and thereupon the jury were discharged from the further consideration of the premises: Therefore it is considered, that the defendant go hence thereof without day, and recover of the said A. B. his costs herein taxed to —.

13. *Jury Sworn — Nonsuit by Order of the Court — Judgment.*

A. B. }
 v. } In Case.
 C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit, E. F., [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, the plaintiff gave to the jury certain matters in evidence, and rested his case; whereupon the defendant moved the court to direct a nonsuit, by reason that the matters aforesaid, so given in evidence as aforesaid by the plaintiff, do not support the case set forth in the declaration; and the arguments of counsel being thereupon heard, and due deliberation had, the court are of opinion that, for the reason aforesaid, the plaintiff be nonsuited: whereupon the jury are discharged from further consideration of the premises. Therefore it is considered, that the defendant go hence without day, and recover of the plaintiff his costs in this behalf expended, taxed to — dollars.

14. *Jury Sworn — Juror withdrawn by Consent — Judgment of Nonsuit.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and also came a jury, to wit,

For Defendant.

E. F., [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, thereupon, by consent of the said parties, one of the jurors of the said jury is withdrawn from the panel thereof, and the residue of the said jury are altogether discharged of giving any verdict of and upon the premises. Therefore it is considered, that the defendant go hence without day, and recover of the plaintiff his costs herein taxed to — dollars.

15. *Judgment for the Defendant on Demurrer to Evidence.**

A. B. }
 v. } In Assumpsit.
 C. D. }

This cause came on to be heard upon the demurrer of the defendant to the evidence of the plaintiff, *and was argued by counsel*, and the court being fully advised in the premises, are of opinion that the matter aforesaid, shown in evidence to the said jury in form aforesaid,* is not sufficient in law to maintain the issue joined between the parties. Therefore it is considered, that the defendant go hence without day, and recover of the plaintiff his costs herein taxed to — dollars.

16. *Judgment for Defendant on Discontinuance.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the said A. B. by his attorney, and discontinues his suit : Therefore it is considered, that the said C. D. go hence without day and recover of the said A. B. his costs herein taxed to — dollars.

17. *Judgment for Defendant on Nolle Prosequi: See ante, p. 901.*

18. *Judgment for Defendant on Nolle Prosequi to one or more Counts:*
See ante, p. 901.

(a) For the form of the entry of the demurrer and joinder, &c., see ante p. 886, 889.

For Defendant.

19. *Judgment for Defendant on Plea of Nul Tiel Record.*

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and the said A. B. hath not here in Court the record of the supposed recovery in the declaration mentioned, but makes default in producing the same : Therefore it is considered, that the said C. D. go hence without day and recover of the said A. B. his costs herein taxed to — dollars.

20. *Verdict set aside and new Trial granted.*

A. B. }
 v. } In Case.
 C. D. }

This day the motion heretofore made in this cause for setting aside the verdict rendered herein on Friday last, and for a new trial, came on to be heard, and was argued by counsel ; on consideration whereof, it is ordered, that the said verdict be, and the same is hereby set aside ; and that a new trial be had between the parties at the next term of this Court ; And it is further ordered, that *within sixty days*, the costs of the present term be paid by the plaintiff, [or, by the defendant ; or, that the costs abide the event of the suit, *as the case may be* ;] and thereupon, on motion of the plaintiff, [or defendant *as the case may be*,] this cause is continued.

21. *Verdict and Judgment for Defendant where Issue is taken on a Plea that the Money paid into Court is sufficient to pay all Damages.**

A. B. }
 v. } In Assumpsit.
 C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit, E. F., [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the plaintiff hath not sustained damages, [or *in Debt*, that the defendant was not and is not indebted to the plaintiff,] to a greater amount than the said sum of [*here insert the amount paid in,*] dollars, in respect to the causes of action in the declaration mentioned. It is therefore considered, that the plaintiff take the said sum

(a) For the form of the entry where no plea is put in upon the question as to whether the amount paid in is large enough, see ante, p. 611.

For Defendant — For Plaintiff and Defendant.

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paid in, and that as to the causes of action in said declaration mentioned, the defendant go acquit and discharged,^b and recover of the plaintiff his costs herein incurred since said money was paid in, taxed to — dollars — cents.

22. *Verdict for the Defendant upon Plea of Tender as to Part, and General Issue as to the Residue, and Judgment thereon.**

A. B. }
v. } In Assumpsit.
C. D. }

This day came the parties by their attorneys, and also came a jury, to wit, E. F., [&c.], who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that as to all the several promises in the declaration mentioned, except as to [five hundred] dollars, parcel, &c., the defendant did not assume and promise in manner and form as the plaintiff hath in his declaration alleged; and as to said [five hundred] dollars, parcel, &c., the jury do find that the defendant did tender the same to the plaintiff in manner and form as the defendant hath in his aforesaid plea alleged. It is therefore considered by the court, that the plaintiff recover and take out of the court here said sum of [five hundred] dollars so tendered, and that the defendant recover of the plaintiff his costs, herein taxed to — dollars — cents.

23. *Verdict and Judgment for and against some of the Defendants in a joint suit against Makers and Indorsers of a Note, Due Bill or Bill of Exchange.*

A. B. }
v. } In Assumpsit.
C. D., E. F. & G. H. }

This day came the parties by their attorneys, and also came a jury, to wit, L. M., [&c.], who being empanelled and sworn the truth to speak upon the issues joined between the parties, upon their oaths do say, that the said C. D. did assume and promise in manner and form as the plaintiff hath in his declaration alleged, and do assess the plaintiff's damages in the premises at — dollars. And the jury do further say that the said E. F. and G. H. did not assume and promise in manner and form as the plaintiff hath in his declaration alleged. It is therefore considered by the court, that the plaintiff recover of the said C. D. the said sum of — dollars, his damages aforesaid assessed, and also his costs herein, in that behalf expended, taxed at — dollars —

(b) Swan's Stat. 660, §61, 62.

(c) 16 Ohio Rep. 457.

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cents; and that the plaintiff take nothing for his false claim against the said E. F. and G. H., and let them go thereof without day, and recover of the plaintiff their costs, herein taxed to — dollars — cents.

SEC. IV. FORM OF COMPLETE RECORD IN THE COMMON PLEAS.

Pleas continued and held at the court house in *Chillicothe*, within and for the county of *Ross*, in the *Sixth* Judicial Circuit of the Court of Common Pleas of the State of Ohio, before the Honorable G. S., President Judge of said *Sixth* Judicial Circuit, and T. S., F. P. and G. H., Associate Judges of said Court of Common Pleas for the county of *Ross* aforesaid, of the term of *May*, to wit, on the *tenth* day of *June*, [date of final judgment,] in the year of our Lord *one thousand eight hundred and thirty-two*.

A. B. }
v. } In Assumpsit.
C. D. }

Be it remembered, that heretofore, to wit, on the *first* day of *August*, in the year of our Lord *one thousand eight hundred and thirty-one*, A. B., by his attorney, filed in the clerk's office of said court the following præcipe and affidavit, [here copy the præcipe and affidavit,] and thereupon on the day and year last aforesaid, the said A. B., by his attorney, sued out of the clerk's office of the court aforesaid, the following writ of *Capias ad respondendum*, against C. D., to wit :

The State of Ohio :

Ross county, ss.

To the Sheriff of said county—Greeting :

We command you to take C. D. if he may be found in your [SEAL.] bailiwick, and him safely keep, so that you have his body before our Court of Common Pleas of the county aforesaid, at the court house in said county, on the first day of their next term, to answer unto A. B. in a plea of *assumpsit* — Damages 1000 dollars, and have you then there this writ. Witness, T. C., clerk of our said Court of Common Pleas, at *Chillicothe*, this *first* day of *August*, A. D. 1831. Upon which writ was the following indorsement, to wit : Suit brought on note given by defendant to plaintiff for 800 dollars, dated June 1, 1831; also for goods sold and delivered, money had and received, &c., damages 1000 dollars. Amount sworn to \$1000. Sheriff will hold to bail in 2000 dollars. X. Y., attorney for plaintiff. And afterwards, to wit, on the *sixth* day of *October*, in the year last aforesaid, the said writ was returned to the court aforesaid by said sheriff, indorsed as follows, to wit : I have taken the body. S. W., sheriff of *Ross* county. And afterwards, to wit, on the day and year last aforesaid, the following recognizance of

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special bail was entered into, to wit: The State of Ohio, *Ross* county, ss. Be it remembered that on the *sixth* day of *October*, in the year of our Lord one thousand eight hundred and thirty-one, G. H. and E. F. of the county of *Ross*, personally appeared before F. C., clerk of the Court of Common Pleas of the county of *Ross*, and severally acknowledged themselves to owe unto the said A. B., the sum of two thousand dollars, to be levied on their several goods and chattels, lands, tenements and estates; upon condition, that if the said defendant, C. D., shall be condemned in this action at the suit of the said A. B., he shall pay the costs and condemnation of the court, or be rendered, or render himself, into the custody of the sheriff of said county, for the same, or in case of failure, that the said G. H. and E. F. will pay the costs and condemnation for him. Taken and acknowledged, the day and year above written, before me, F. C., clerk. And afterwards, to wit, on the same day and year last aforesaid, on motion of the said A. B., this cause was continued until the next term of this court. And afterwards, to wit, on the *second* day of *March*, in the year of our Lord one thousand eight hundred and thirty-two, the said A. B. filed in the clerk's office aforesaid, the following declaration, to wit: *Ross* county, ss. Court of Common Pleas, October Term, A. D. 1831. A. B. complains of C. D. in a plea of *assumpsit*, for that whereas the said C. D. on the first day of June, in the year of our Lord one thousand eight hundred and thirty-one, at the county of *Ross* aforesaid, made his promissory note in writing, and delivered the same to the said A. B., and thereby promised to pay to the said A. B. or order, eight hundred dollars in thirty days after the date thereof, which period has now elapsed, and the said C. D. then and there in consideration of the premises, promised to pay the amount of the said note to the said A. B. according to the tenor and effect thereof. And also for that whereas, the said C. D. on the tenth day of July, in the year of our Lord one thousand eight hundred and thirty-one, was indebted to the said A. B. in one hundred dollars for the price and value of goods, then and there bargained and sold by the said A. B. to the said C. D., at his request. And in one hundred dollars for money then and there lent by the said A. B. to the said C. D. at his request. And whereas, the said C. D., afterwards, to wit, on the *twentieth* day of July, in the year last aforesaid, in consideration of the premises, then and there promised to pay the said last mentioned several sums of money to the said A. B. on request. Yet he hath disregarded his promises, and hath not paid the said several sums of money, nor either of them, nor any part thereof: to the damage of the said A. B., 1000 dollars; and thereupon he brings suit, &c.; by X. Y., his attorney. And afterwards, to wit, on the *fourth* day of *May*, in the year last aforesaid, the said C. D. filed in the clerk's office aforesaid, the following plea, to wit: C. D. *ads.* A. B. *Ross* county *Common Pleas*. And the said C. D. comes and defends, &c., and says that he did not assume and promise in manner and form as the said A. B. hath declared against him, and of this he puts himself upon the country; by C. W., his attorney; and the said A. B. doth the like. And afterwards, to wit, at the *May* term of the said court, in the year of our Lord one thousand eight

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hundred and thirty-two, to wit, on the *fifth* day of *June*, the year last aforesaid, came as well the parties aforesaid, as also a jury, and thereupon a verdict of the same jury was taken upon the issue joined between the parties, as follows, to wit: A. B. v. C. D. This day came the parties by their attorneys, and thereupon came a jury, to wit, E. F., G. H., J. V., L. M., N. O., P. Q., R. S., T. U., V. W., A. S., T. S., and B. S., who, being empaneled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the said C. D. did assume and promise in manner and form as the said A. B. hath complained against him; and they assess the damages of the said A. B. by reason thereof, to eight hundred dollars: And thereupon the said C. D. moved the court for a new trial, and filed his reasons therefor, as follows, to wit: C. D. *ads.* A. B.: Motion for a new trial. The said C. D. moves the court for a new trial in this cause, for the following reasons, to wit: First, because the verdict of the jury was against the weight of evidence. Second, because the court erred in admitting the deposition of T. S. in behalf of the plaintiff: by C. W., his attorney. And afterwards, to wit, on the *sixth* day of *June*, in the year of our Lord one thousand eight hundred and thirty-two, came again the parties, and thereupon said motion for a new trial was overruled by the court, as follows, to wit: A. B. v. C. D. In Assumpsit: This day again came the parties by their attorneys, and the motion of the said C. D. for a new trial came on to be heard, and was argued by counsel; on consideration whereof, it is ordered by the court that the said motion be overruled. And thereupon, afterwards, to wit, on the day and year *first* aforesaid, to wit: on the *tenth* of *June*, in the year of our Lord one thousand eight hundred and thirty-two, came again the said A. B. and prays judgment upon the premises against the said C. D.; Wherefore it is considered, that the said A. B. recover of the said C. D. the said sum of eight hundred dollars, his damages aforesaid, in form aforesaid assessed, and also his costs in that behalf expended, taxed to *twenty* dollars.

Form of Attestation and Certificate.

The State of Ohio, *Ross* County, ss.

I hereby certify that the foregoing is truly taken and copied from the records of the proceedings of the *Court of Common Pleas*, within and for the said county of *Ross*.

In testimony whereof, I do hereto subscribe my name and affix the seal of said court this — day of — A. D. —.

F. C., Clerk of the Court of Common Pleas

[SEAL.]

of said *Ross* County.

I, A. B., *President Judge* of the *Court of Common Pleas*, within and for the county of *Ross*, and state of Ohio, do hereby certify, that F. C. is and was at time of the attestation aforesaid, clerk of said court, and that his attestation aforesaid is in due form of law. [This certificate is unnecessary when the record is to be used in the courts of the same state.]

Dated, &c.

A. B.

CHAPTER XXII.

VERDICTS AND JUDGMENTS IN DEBT.

SECTION I. GENERAL DIRECTIONS.

II. FORMS OF VERDICTS AND JUDGMENTS IN FAVOR OF THE PLAINTIFF.

1. Judgment, &c. on warrant of attorney.
2. Judgment by default on single bond, simple contract, note, &c. Debt found and damages assessed by the court.
3. Judgment by default on single bill, contract, note, &c. Debt found and damages assessed by the jury.
4. Verdict by Jury and judgment for plaintiff on plea of nil debit.
5. Verdict and Judgment for plaintiff on plea of non est factum — suit on single bill, &c.
6. Judgment for plaintiff on demurrer to declaration on simple contract, single bond, bond with a penalty, note, &c. — assessment of damages by the jury, and the court, and judgment thereon : See ante, p. 839.
7. Submission to the court to try the issue and assess damages — verdict and judgment for the plaintiff.
8. Verdict and Judgment for the plaintiff in an action on a penal bond, where the breaches are assigned in the declaration and issue taken to the country.
9. Judgment for the plaintiff in an action on a penal bond for the amount equitably due, found by the court after judgment by default, breaches being assigned in the declaration.
10. The like where breaches are not assigned in the declaration.
11. Verdict and Judgment on a penal bond for the amount equitably due, found by a jury after judgment by default, breaches being assigned in the declaration.
12. Verdict and Judgment for the plaintiff where the first count in the declaration is upon a due bill, and plea thereto nil debit and verdict for the plaintiff, and the second count of the declaration is the common counts, and plea thereto payment and verdict for the defendant.

General Directions.

13. Verdict and Judgment for the plaintiff on plea of solvit ad diem.
14. Verdict and Judgment for the plaintiff on plea of nul tiel record.
15. Skeleton form when there are several issues — jury empannelled — trial continued more than one day — verdict for plaintiff — motion for a new trial and overruled — motion in arrest of judgment and overruled — judgment on the verdict — bills of exception filed : See ante, p. 941.

III. VERDICTS AND JUDGMENTS FOR THE DEFENDANT.

1. Verdict and Judgment for defendant on nil debit.
2. Verdict and Judgment for defendant on non est factum.
3. Verdict and Judgment for defendant on plea of non est factum and notice of set-off — balance found in favor of the defendant.
4. Verdict and Judgment for the defendant upon plea of nil debit, and verdict against the defendant on notice of set-off.
5. Judgment for defendant on submission to the court to try the issue.
6. Judgment for defendant on non-suit after jury sworn : See ante, p. 955.
7. The like before jury sworn : See ante, p. 954.
8. Non-suit for want of declaration : See ante, p. 954.
9. Non-suit for want of replication : See ante, p. 954.
10. Judgment for defendant on discontinuance : See ante, p. 956.
11. The like on nolle prosequi : See ante, p. 901.
12. The like as to one or more counts : See ante, p. 901.

For the form of judgment, &c., when there is a demurrer to be disposed of, see ante, p. 835.

SEC. I. GENERAL DIRECTIONS.

The statement of the empanelling of the jury, and the general directions already given in the first section of the preceding chapter as to the form of verdicts in respect of the issues, are applicable to the forms in Debt.

(a) Ante, p. 935.

General Directions.

It will be observed, however, that in *assumpsit* the verdict finds, and the judgment is rendered for damages only.

In debt, that part of the verdict and judgment which relates to damages, assumes various forms :

I. In actions upon the forfeiture or penalty contained in a bond or contract, breaches of the condition are assigned either in the declaration or in the replication, or upon the record. In such case, if the jury find a verdict for the plaintiff, they assess damages on the breaches assigned, and judgment is rendered for the full amount of the penalty, but the court award execution thereon for the amount of the damages so assessed, with costs.^b

II. If in actions upon a forfeiture or penalty contained in a bond or contract, judgment is given for the plaintiff on demurrer, or by default, or confession, the court in like manner render judgment for the full amount of the penalty ; and award execution for the amount then due according to equity ; and when the sum for which execution should be awarded is uncertain, upon application of either party, an assessment is made by a jury.^c

When suit is brought upon a sealed instrument, whether for a penalty or not, or upon a record, the defendant in general passes over the question as to the debt, and takes issue upon another matter, as that the instrument declared on is not his deed, (*non est factum* ;) or that there is no such record, (*nul tiel record* ;) or that he paid the debt at the time it became due, (*solvit ad diem* ;) in these and the like cases, the defendant admits by any one of these pleas, that he owes the debt, if the issue be found against him ; and therefore, if the jury find such issue against the plaintiff, they need not say any thing in their verdict about the penalty or debt ; (for that is a conclusion of law, which the court embody in their judgment ;) but, after finding the issue in favor of the plaintiff, the jury need only assess the damages for the breach of the bond, if the suit is brought for a penalty ; or only assess the damages for the detention of the debt, if the suit is brought on a single bill or other sealed instrument containing no penalty. On default, however, and when the issue makes a question as to the debt or amount, there the jury pass on the amount of the debt as well as the damages.

III. When the suit is brought on a simple contract, as a promissory note or the like, the jury, in general, finding the issues in favor of the plaintiff, find also the amount of the debt, and the damages for its detention ; and the judgment is in the same form as upon a single bill, &c., just mentioned.^d

IV. It often happens that there is a double issue in debt, by reason of the declaration containing a count on a sealed instrument and the common counts ; for, in such case, the defendant, is, in general, compelled to plead separate pleas. Where this occurs, and the single bill forms the only ground of action, a verdict is usually rendered in favor of the plaintiff on the single bill

(b) Swan's Stat. 659, 857. See the form post.

(c) Id. Ib. See the form post.

(d) See the form post.

For Plaintiff.

and against him on the common counts. The form of the judgment in such case need not be here described.*

In debt, the interest only, is in general, assessed as damages. But when the suit is brought on the penalty of a bond, and breaches of the condition are assigned, the damages assessed cover whatever damages have accrued on the breaches.

SEC. II. FORMS OF VERDICTS AND JUDGMENTS IN DEBT IN FAVOR OF THE PLAINTIFF.

1. *Judgment &c. on Warrant of Attorney.*

A. B. }
v. } In Debt.
C. D. }

This day came A. B., by J. S., his attorney, and filed his declaration against the said C. D., and thereupon J. W., one of the attorneys of this court, appeared in open court, in behalf of the said C. D. and by virtue of a warrant of attorney for that purpose executed by the said C. D., and now produced, and duly proved and filed, waived the issuing and service of process, and acknowledged that the said C. D. doth owe the said A. B. the sum of — dollars, debt, and that said A. B. hath sustained damages by the detention thereof, in the sum of — dollars, in manner and form as is alleged in said declaration. Therefore it is considered, that the said A. B. recover of said C. D. said sum of — dollars debt, and said sum of — damages, so confessed, and also the costs herein taxed to —. And by virtue of the same warrant of attorney all error and writs of error are released.

2. *Judgment by Default on single bonds, simple contracts, note, &c. — Debt found and Damages assessed by the Court.*

A. B. }
v. } In Debt.
C. D. }

This day came the said A. B. by his attorney, and the said C. D. though solemnly called, came not, but made default; whereupon it is considered, that the said A. B. ought to recover his debt against the said C. D., and his damages by reason of the detention thereof; and thereupon * neither of the parties requiring a jury, and the court being fully advised in the premises do find that the said C. D. doth owe to the said A. B. the sum of — dollars, and do assess his damages, by reason of the detention thereof, to — dollars; There-

(*) See the form post.

For Plaintiff.

fore it is considered, that the said A. B. recover of the said C. D. the sum of — dollars, said debt, and — dollars, his said damages, and also his costs herein taxed to — dollars.

3. *Judgment by Default on single bonds, simple contract, notes, &c.—Debt found and Damages assessed by the Jury.*

Follow the preceding form to the star then proceed as follows:—*the said A. B. [*or say the said C. D.*] demanded a jury, and thereupon a jury being called came, to wit: E. F. [&c.] who being empanelled and sworn to inquire of the said debt and damages, upon their oaths, do say, that the defendant doth owe the plaintiff the sum of — dollars, and they assess the damages for the detention thereof, to — dollars. Therefore it is considered, that the plaintiff recover of the defendant the sum of — dollars, said debt, and — dollars, said damages assessed, and also his costs herein taxed to — dollars — cents.

4. *Verdict and Judgment for Plaintiff or Plea of Nil debit.*

A. B. }
 v. } In Debt.
 C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit: E. F. [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say,* that the said C. D. doth owe to the said A. B. the sum of — dollars, in manner and form as the said A. B. hath complained against him; and they assess the damages for the detention thereof to — dollars: Therefore it is considered, that the said A. B. recover of the said C. D. the sum of — dollars, said debt, and — dollars, said damages assessed, and also his costs herein taxed to — dollars.

5. *Verdict and Judgment for Plaintiff on Plea of non est factum—Suit on Single Bill, &c.*

Follow the preceding form to the star and then proceed as follows:—*that the said writing [*or single bill*] is the deed of the defendant as the plaintiff hath complained against him, and they assess the damages of the plaintiff, by reason of the premises, at [*this is generally the interest,*] dollars. Therefore it is considered, that the plaintiff recover of the defendant said sum of

For Plaintiff.

[*This is generally the face of the single bill,*] dollars, his debt aforesaid, and said sum of — dollars, his damages aforesaid assessed, and also his costs herein taxed to — dollars — cents.

6. *Judgment for Plaintiff on Demurrer to Declaration on Simple Contract, Single Bill, &c. — Assessment of Damages by the Jury and Judgment thereon: See ante p. 839.*
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7. *Submission to the Court to try the issue — Single bill obtained by fraud — and to Assess Damages — Verdict and Judgment for the Plaintiff.*

A. B. }
 v. } In Debt.
 C. D. }

This day came the parties by their attorneys and submit this cause to the court upon the issue joined; and the court being fully advised, do find that, [*here enter the finding of the court upon the issue, as if it were the verdict of a jury. Thus, if the only issue be whether the single bill sued on was obtained by fraud, the finding of the court will be as follows: the said writing in the declaration mentioned, was not obtained from the defendant by the plaintiff, or others in collusion with him, by fraud, covin or misrepresentation, as the defendant hath in that behalf alleged; and do assess the damages, by reason of the detention of said debt, to five dollars fifty cents;]* Therefore it is considered, that the plaintiff recover of the defendant the said sum of *three hundred dollars*, the debt in the declaration mentioned, and *five dollars fifty cents*, the damages aforesaid, and also his costs herein taxed to — dollars.

8. *Verdict and Judgment for the Plaintiff in an action on a Penal Bond where the Breaches are assigned in the Declaration* and issue taken to the Country.*

A. B. }
 v. } In Debt.
 C. D. }

This day came the parties by their attorneys and thereupon came a jury, to wit: E. F. [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the said writing obligatory is the deed of the said C. D. as the said A. B. hath in that behalf alleged; and they do further say, that, "the said C. D. did not," [&c. *Here*

(a) See ante p. 354, note.

For Plaintiff.

state what the defendant did, or omitted to do, as alleged in the assignment of breaches ;] and the said jury do further say that said A. B. hath sustained damages by reason of the premises to — dollars ; Therefore it is considered, that the said A. B. recover of the said C. D. the said sum of — dollars his debt aforesaid [*The penalty of the bond :*] and that execution issue thereon against the said C. D. for the said sum of — dollars, the damages aforesaid, by the jury aforesaid assessed, and also for — dollars, the costs of the said A. B. in this behalf expended.

9. *Judgment for the Plaintiff in an action on a penal bond for the amount equitably due, found by the Court, after Judgment by Default, Breaches being assigned in the Declaration.**

A. B. }
 v. }
 C. D. } In Debt.

This day came the said A. B. by his attorney, and the said C. D. though solemnly called, came not but made default : Whereupon it is considered, that the said A. B. ought as well to recover against the said C. D. his debt, as also to have execution for so much thereof as may be due according to equity ;* and thereupon, neither party demanding a jury, and the court being fully advised in the premises, do find that the sum of — dollars is now due from the said C. D. to the said A. B. according to equity : Therefore it is considered, that the said A. B. recover of the said C. D. the said sum of — dollars, his debt aforesaid [*the penalty of the bond :*] and that execution issue thereon against the said C. D. for the said sum of — dollars, the amount now due as aforesaid according to equity, and also for — dollars, the costs of the said A. B. in this behalf expended. [*The proceedings after judgment by confession, are substantially the same as in this precedent. For the form in proceedings on Demurrer, see ante p. 839.*

10. *The like when Breaches are not assigned in the Declaration.**

Follow the preceding form to the star, then proceed as follows :]*—but because judgment hereof should not be given until the truth of certain breaches hereafter to be assigned by the said A. B., shall be inquired into, and the amount equitably due to the said A. B. by reason of those breaches shall be ascertained, therefore let judgment hereof be stayed until such time as the said premises shall be ascertained.

After the judgment is thus taken, if no breaches are assigned in the dec-

(a) As to the assignment of breaches in the declaration or on the record and the statute, see ante p. 854, note.

For Plaintiff.

laration or replication, here enter the assignment of breaches. See the form ante p. 734, 735. The final judgment is then entered on the record. And now comes again the said A. B. by his attorney, and neither party demanding jury, [&c., as in the preceding form to the end.

11. *Verdict and Judgment for the Plaintiff on a penal bond, for the amount equitably due, found by a Jury, after judgment by default, breaches being assigned in the declaration.*

A. B. }
v. } In Debt.
C. D. }

This day came the plaintiff by his attorney, and the defendant, though called, came not, but made default: Whereupon it is considered, that the plaintiff ought to recover against the defendant his debt, and have execution for so much thereof as may be due according to equity; and thereupon the said [A. B., or say C. D., as the case may be,] demanding a jury to ascertain the same, a jury came, to wit, E. F., [&c.] who, being empanelled and sworn to ascertain the amount now equitably due to the plaintiff in the premises, upon their oaths do say, that the sum of — dollars is now due, by reason of the premises, to the plaintiff, according to equity. Therefore it is considered, that the plaintiff recover of the defendant the said sum of — [here insert the penalty of the bond] dollars, his debt aforesaid; and that execution issue herein for the said sum of — dollars, the amount now due, in equity; and also for — dollars, the costs herein of the plaintiff.

12. *Verdict and Judgment for Plaintiff where the first count of the declaration is upon a simple contract, promissory note, &c., and plea thereto nil debit and verdict for the Plaintiff; and the second count of the declaration is the common counts, and plea thereto payment, and verdict for the defendant.*

A. B. }
v. } In Debt.
C. D. }

This day came the parties by their attorneys, and also came a jury, to wit, E. F., [&c.] who being empanelled and sworn the truth to speak upon the issues joined, upon their oaths do say, that as to the first issue joined between the parties, the defendant doth owe to the plaintiff the sum of — dollars, in manner and form as the plaintiff, in the first count of his declaration, hath alleged, and they assess his damages, for the detention thereof, to — dollars; and as to the second issue joined between the parties, the jury aforesaid do

For Plaintiff.

find that the plaintiff did pay, satisfy, and discharge all causes of action in the said second count of said declaration mentioned, in manner and form as the defendant hath in his said plea alleged. It is therefore considered by the court, that the plaintiff recover of the defendant the said sum of — dollars, the debt aforesaid, and — dollars, the said damages assessed, and also his costs herein taxed to — dollars, and that the plaintiff take nothing by his false claim against the defendant, as to the premises whereof the defendant is acquitted, as aforesaid, by the jury; and let the defendant go thereof without day.

13. *Verdict and Judgment for the Plaintiff on plea of solvit ad diem.*

A. B. }
 v. } In Debt.
 C. D. }

This day came the parties by their attorneys, and also came a jury, to wit, E. F., [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the defendant did not pay to the plaintiff the said sum of — dollars, or any part thereof, on the — day of —, in the condition of the said writing obligatory mentioned, according to the said condition, in manner and form as the defendant hath alleged; and they assess the damages of the plaintiff, by reason of the premises, to — dollars. Therefore it is considered, that the plaintiff recover of the defendant the sum of — dollars, his debt aforesaid, and — dollars, his damages aforesaid assessed; and also his costs herein taxed to — dollars — cents.

14. *Verdict and Judgment for Plaintiff, on plea of Nul tiel record.*

A. B. }
 v. } In Debt.
 C. D. }

This day came the parties by their attorneys, and the record aforesaid being inspected by the Court, it sufficiently appears that there is such a record of recovery against the said C. D., at the suit of the said A. B., as he hath alleged: whereupon it is considered, that the said A. B. ought to recover his debt aforesaid and also his damages, by reason of the detention thereof,* but because the said damages are to the court unknown, it is ordered that a jury be empanelled to inform the court of the same; and thereupon a jury being called, came, to wit, E. F. [&c.] who being empanelled and sworn to inquire of the said damages, do assess the same to — dollars. Therefore it is considered, that the said A. B. recover of the said C. D. the sum of — dollars, his debt aforesaid, and — dollars, his damages aforesaid; and also his costs herein, taxed to — dollars.

For Defendant.

The like, Damages assessed by the Court.

*Follow the preceding form to the *, and then proceed as follows:]* and thereupon neither party requiring a jury, and the court being fully advised, do assess the said damages at — dollars. Therefore it is considered, that the plaintiff recover of the defendant the said sum of — dollars, his debt aforesaid, and the sum of — dollars, his damages aforesaid assessed; and also his costs herein taxed to — dollars — cents.

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15. *Skeleton form where there are several issues — Jury empanelled — Trial continuing for more than one day — Verdict for Plaintiff — Motion for a New Trial; motion overruled — Motion in Arrest of Judgment; motion overruled — Judgment on the Verdict — Bills of exception filed.*

See ante p. 941, to the *. [*If the suit is upon a penal bond, the judgment will be inserted at the * in that form as follows:*] Whereupon it is considered, that the plaintiff recover of the defendant the said sum of — [*here insert the penalty of the bond*] dollars, his debt aforesaid; and that execution issue herein for the said sum of — dollars, the damages aforesaid assessed, and also for — dollars, the costs herein of the plaintiff.

But if the suit is on a single bill, promissory note or other simple contract, the judgment will be entered thus:] Whereupon it is considered, that the plaintiff recover of the defendant the sum of — dollars, his debt aforesaid, and — dollars, his damages aforesaid assessed; and also his costs herein expended, taxed to — dollars — cents.

SEC. III. VERDICTS AND JUDGMENTS FOR THE DEFENDANT.

1. *Verdict and Judgment for the Defendant on Nil debit.*

A. B. }
 v. }
 C. D. } In Debt.

This day came the parties by their attorneys, and also came a jury, to wit, E. F., [&c.] who being empanelled and sworn the truth to speak upon the issue joined, upon their oaths do say,* that the defendant doth not owe the plaintiff the said sum [*or say, sums*] of money demanded by him, or any part thereof, as he hath complained. Therefore it is considered, that the defendant go hence without day, and recover of the plaintiff his costs herein taxed to — dollars.

For Defendant.

2. *Verdict and Judgment for the Defendant on Non est factum.*

*Follow the preceding form to the *, and then proceed as follows:]* that the above mentioned [writing obligatory or deed] is not the deed of the defendant, as the plaintiff hath in that behalf alleged. Therefore it is considered, that the defendant go hence without day, and recover of the plaintiff his costs herein taxed to — dollars.

3. *Verdict and Judgment for Defendant on plea of Non Est Factum, and Notice of Set Off— Balance found in favor of the Defendant.*

A. B. }
 v. } In Debt.
 C. D. }

This day came the parties by their attorneys, and also came a jury, to wit: E. F., [&c.] who, being empannelled and sworn the truth to speak upon the issue joined, upon their oaths do say, that the said writing is the deed of the defendant as the plaintiff hath alleged, and they assess the damages of the plaintiff at *fifty* dollars, for the detention of the debt of *five hundred* dollars in the declaration mentioned, and which said debt and damages amount to the sum of *five hundred and fifty* dollars; and the jury aforesaid do further say, that the plaintiff doth owe the defendant the sum of *eight hundred* dollars, parcel of the several sums above demanded by the defendant in his notice of set off, and doth not owe the residue thereof; and so the said jury find that after deducting said sum of *five hundred and fifty* dollars, debt and damages first mentioned, from said last mentioned sum of *eight hundred* dollars, a balance of *two hundred and fifty* dollars is due from the plaintiff to the defendant. Therefore it is considered, that the defendant recover of the plaintiff said sum of two hundred and fifty dollars, and also his costs herein taxed to — dollars, — cents.

4. *Verdict and Judgment for the Defendant, upon Plea of Nil Debit, and Verdict against the Defendant on Notice of Set Off.*

A. B. }
 v. } In Debt.
 C. D. }

This day came the parties by their attorneys, and also came a jury, to wit: E. F. [&c.] who, being empannelled and sworn the truth to speak upon the issue joined, upon their oaths do say, that the defendant doth not owe the plaintiff the said sum of money demanded by him, or any part thereof, as he hath complained; that the plaintiff doth not owe the defendant any of the several sums of money demanded by the defendant in his notice of set off, or any

For Defendant.

part thereof. Therefore, it is considered, that the defendant go hence without day, and recover of the plaintiff his costs herein taxed to — dollars, — cts.

5. *Judgment for the Defendant on submission to the Court to try the Issue.*

A B. }
v. } In Debt.
C. D. }

This day came the parties by their attorneys and submit this cause to the court upon the issue joined, and the court being fully advised in the premises, do find that, [*Here insert the affirmative or negative of the issue in favor of the defendant as in the verdict of a jury for the defendant, as thus on nil debit: the defendant doth not owe the plaintiff in manner and form as the plaintiff hath complained against him. And then enter the judgment thus:—* Therefore, it is considered, that the defendant go hence without day, and recover of the plaintiff his costs herein taxed to — dollars, — cents.

6. *Judgment for Defendant upon Nonsuit: See ante, p. 955.*

7. *The Like before Jury Sworn: See ante, p. 954.*

8. *Nonsuit for want of Declaration: See ante, p. 954.*

9. *Nonsuit for want of Replication: See ante, p. 954.*

10. *Judgment for Defendant on Discontinuance: See ante, p. 956.*

11. *The Like on Nolle Prosequi: See ante, p. 901.*

12. *The Like as to one or more Counts: See ante, p. 901.*

CHAPTER XXIII.

VERDICTS AND JUDGMENTS IN COVENANT.

GENERAL DIRECTIONS AS TO THE FORM OF VERDICTS AND JUDGMENTS IN COVENANT.

The directions heretofore given^a in regard to the form of the verdict, are equally applicable in covenant, and need not here be repeated. As in assumpsit when the jury find the issue for the plaintiff, damages are assessed by the jury, and the judgment thereon is in the same form as in assumpsit.

When the verdict is for the defendant, or when there is a non suit, discontinuance, &c., the judgment is also in the same form as in assumpsit.

It will, therefore, be unnecessary to give here anything more than a skeleton form of a verdict and judgment in covenant, inasmuch as the forms already given in assumpsit can be readily modified and applied to covenant.

For the form of judgment, &c., when a demurrer is disposed of, see ante, page 835.

Form of Verdict and Judgment in Covenant for the Plaintiff.

A. B. }
v. } In Covenant.
C. D. }

This day came the parties by their attorneys, and also came a jury, to wit : E. F., [&c.] who, being empanelled and sworn the truth to speak upon the issues joined, upon their oaths do say, that,* [*Here enter the finding of the jury upon the issues and the damages assessed, if any, as in the forms in assumpsit ; thus, if the issue be non est factum and the verdict for the plaintiff, enter the verdict as follows: the indenture, or say, articles of agreement, or, deed poll, as the same may be named in the pleadings,*] in the declaration mentioned in the deed of the defendant ; and they assess the damages of the plaintiff by reason of the breaches of covenant in the declaration assigned at — dollars.

Therefore, it is considered, that the plaintiff recover of the defendant the said sum of — dollars, his damages aforesaid assessed, and also his costs herein taxed to — dollars.

(a) Ante, p. 935.

For Defendant.

Form of Verdict and Judgment in Covenant for the Defendant.

*Follow the preceding form to the *, then enter the verdict. Thus, if the defendant has plead performance of the covenant and a verdict is for him, enter it in the form following:] the defendant hath kept and performed the said [indenture or articles of agreement,] and all things therein contained as he hath in his said plea alleged.*

Therefore, it is considered, that the defendant go hence without day and recover of the plaintiff his costs herein taxed to—— dollars.

CHAPTER XXIV.

VERDICTS AND JUDGMENTS IN DETINUE.

1. *Verdict and Judgment for Plaintiff, on Non ditinet.*

A. B. }
v. } In Detinue.
C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit: E. F., [&c.] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say,* that the said C. D. doth detain the *goods and chattels*, or, *deeds and papers*, in the said declaration mentioned, in manner and form as the said A. B. hath complained against him; and they find the *goods and chattels*, or, *deeds and papers* so detained, to be of the value of — dollars; and they assess the damages of the said A. B. on occasion of the detention of said *goods and chattels*, or, *deeds and papers*, to — dollars; therefore, it is considered, that the said A. B. recover of the said C. D. the said good and chattels, [or, *deeds and papers, enumerating them if enumerated in the verdict,*] or the said sum of — dollars, for the value of the same, if the said A. B. cannot have again his said goods and chattels, and also his said damages, beyond the value aforesaid, by the jurors aforesaid, in form aforesaid assessed, together with his costs in this behalf expended, taxed to — dollars.*

(a) This is the proper form of a Verdict, where the jury find a verdict *for the whole*, in favor of the plaintiff; but where the jury find *for a part* only, then *each* article and its value must be found by the verdict; *Arch. Forms*, 140; 1 *Chit. Pl.* 115. The nature of this action requires that the verdict and judgment be such, that a specific remedy may be had for the recovery of the goods detained; or a satisfaction in value for each several parcel, in case they be not delivered; 2 *W. Bl.* 833. The verdict in such case runs thus: "Upon their oath, do say that the said C. D. doth detain the said *book* above mentioned, and also the said *deed* above mentioned, in manner and form as the said A. B. hath complained against him; and they find the

said *book* to be of the value of — dollars, and the said *deed* to be of the value of — dollars, and they assess the damages of the said A. B. on occasion of the detention of said *book* and said *deed* at — dollars. And the jury aforesaid do further say, that the said C. D. doth not detain the said *picture* above mentioned, in manner and form as the said A. B. hath complained against him." If on an issue as to *several* articles contained in one count, the jury find no verdict as to *part* of them, it is no error, but the plaintiff is barred of his title to the things omitted; *Swen's Stat.* 684, § 132. At common law, if the jury neglected to find the *value* the omission could not be supplied by a writ of inquiry. This defect is removed by the statute above cited.

For Defendant.

2. *The like, upon a Verdict for part.*

Enter the verdict:]—Therefore, it is considered, that the said A. B. recover of the said C. D. the said *Book*, or the said sum of — dollars for the value of the same, if the said A. B. cannot have again his said *Book*; and also the said *Deed*, or the said sum of — dollars for the value of the same, if the said A. B. cannot have again his said *Deed*, and also his said damages by the jurors aforesaid in form aforesaid assessed, together with his costs in this behalf expended, taxed to — dollars.

3. *Verdict and Judgment for Defendant.*

Commence as in No. 1, ante, 976.]—upon their oaths do say that the said C. D. doth not detain the *goods and chattels* in the said declaration mentioned, in manner and form as the said A. B. hath complained against him; therefore, it is considered, that the said C. D. go hence without day, and recover of the said A. B. his costs herein expended, taxed to — dollars.

In such case the form is thus: "This day came, &c.,—who being empaneled, &c.,—say that the said C. D. doth detain the said *goods and chattels* in manner and form as the said A. B. hath complained against him, and they do assess the damages of the said A. B. by reason of the detention thereof, to — dollars: Therefore, it is considered, that the said A. B. ought to recover of the said C. D. the said *goods and chattels*, or the value of the same, and also his said damages; but because the *value* of the said *goods and chattels* is to the court unknown, therefore let a jury come to assess the same; and thereupon a jury being called, came, to wit: E. F., &c., who being empanelled and sworn to inquire of the *value* of the said *goods and chattels*, upon their oaths do say, that the said *goods and chattels* are of the *value* of — dollars." [If the jury, upon the issue, find in part only, for the

plaintiff, the verdict upon the inquiry must enumerate each article, and specify its value as before directed.] Therefore, it is considered, &c

In the Common Law Precedents, after entering the judgment as above, it is ordered as follows: "And hereupon the Sheriff is commanded that he distrain the said Joseph Styles, by all his *lands and chattels* in his bailiwick, so that neither he, the said Joseph Styles, nor any one by him, do lay hands on the same until the said Sheriff shall have another command from the court of — in that behalf, and that the said Sheriff answer for the issues of the same, so that he the said Joseph Styles render to the said John Nokes the *goods and chattels*," &c., aforesaid, or the said sum, &c., for the value of the same; and in what manner, &c., he is commanded to make appear, &c." *Arch. Pr.* 140. *SEE Executions*, *Post.* Wil. 273.

CHAPTER XXV.

VERDICTS AND JUDGMENTS IN CASE — TROVER AND TRESPASS.

SECTION I. GENERAL DIRECTIONS.

II. FORMS.

1. Verdict and judgment for the plaintiff upon a plea of not guilty.
2. Verdict and judgment for the defendant upon a plea of not guilty.
3. Verdict and judgment for the plaintiff in libel or slander — issues not guilty and justification.
4. Verdict and judgment for the defendant in libel or slander — issue upon a plea of justification.
5. Judgment for defendant upon nonsuit : See ante, p. 955.
6. The like before jury sworn : See ante, p. 954.
7. Nonsuit for want of a declaration : See ante, p. 954.
8. Nonsuit for want of a replication : See ante, p. 954.
9. Judgment for defendant on discontinuance : See ante, p. 956.
10. The like on nolle prosequi : See ante, p. 901.
11. The like as to one or more counts : See ante, p. 901.

For the forms of judgments, &c., when there is to be a demurrer disposed of, see ante, p. 835.

For the form of entries when the cause occupies more than one day, and bills of exceptions are taken, motions for nonsuit, new trial and in arrest of judgment overruled, see ante, p. 941.

SEC. I. GENERAL DIRECTIONS.

Where the plaintiff recovers in these actions, the jury, as in assumpsit, assess his damages.

For Plaintiff. For Defendant.

The statement of the empanelling of the jury and the finding of the jury according to the issues and the assessment of damages, is precisely in the form already given in *assumpsit*. So, the judgment whether for the plaintiff or defendant, is in the same form as in *assumpsit*.

The reader is therefore referred to those forms.*

The general issue, however, in case, trespass and trover, &c., is not guilty, and the verdict must of course conform to the issue.

SEC. II. FORMS OF VERDICTS AND JUDGMENTS.

1. *Verdict and Judgment for the Plaintiff upon a Plea of not Guilty.*

A. B. }
v. } In Case.
C. D. }

This day came the parties by their attorneys, and also came a jury, to wit: E. F., [&c.] who, being empanelled and sworn the truth to speak upon the issue joined, upon their oaths do say, that* the defendant is guilty in manner and form as the plaintiff hath complained against him, and they assess the damages of the plaintiff by reason of the premises to — dollars. Therefore it is considered, that the plaintiff recover of the defendant the said sum of — dollars, his damages aforesaid assessed, and also his costs herein taxed to — dollars.

2. *Verdict and Judgment for the Defendant upon Plea of not Guilty.*

*Follow the preceding form to the *, and then as follows:*] the defendant is not guilty in manner and form as the plaintiff hath complained against him. Therefore it is considered, that the defendant go hence without day and recover of the plaintiff his costs herein taxed to — dollars.

3. *Verdict and Judgment for the Plaintiff in Libel or Slander — Issues not Guilty and Justification.*

*Follow the preceding form No. 1 to the *, or No. 6, ante, p. 940, to the entry of the verdict and then as follows:*] that the defendant is guilty in manner and form as the plaintiff hath complained against him; and that the defendant of his own wrong, committed the said grievances mentioned in the introductory part of the [second] plea of the defendant, in manner and form as the plaintiff hath complained against him; and they assess the damages of

(a) Ante, p. 938.

For Defendant.

the plaintiff by reason of the premises at—— dollars. Therefore it is considered, that the plaintiff recover of the defendant, the said sum of—— dollars, his damages aforesaid, assessed, and also his costs herein taxed to—— dollars—— cents.

4. *Verdict and Judgment for the Defendant upon plea of Justification of Libel or Slander.*

*Follow the preceding form No. 1 to the *, and then proceed as follows:]* that the defendant committed the said supposed grievances in the declaration mentioned [*or if the justification goes to part of the slander or libel say, the defendant committed the said supposed grievances in the introductory part of his [second] plea mentioned,*] as he lawfully might for the causes in said plea alleged. Therefore it is considered, that the defendant go hence without day, and recover of the plaintiff his costs herein taxed to—— dollars—— cents.

CHAPTER XXVI.

VERDICTS AND JUDGMENTS IN REPLEVIN.

SECTION I. GENERAL DIRECTIONS AS TO THE FORM OF VERDICTS AND JUDGMENTS IN REPLEVIN.

II. FORMS OF VERDICTS AND JUDGMENTS IN REPLEVIN.

1. Verdict and judgment for plaintiff on plea of non detinet—damages assessed by the jury.
2. Verdict and judgment for plaintiff—damages assessed by jury.
3. Damages assessed, and judgment for defendant on discontinuance, and right of property (or right of possession, &c.) found in defendant.
4. The like, on nonsuit.
5. The like, on demurrer to plea.
6. Issue found for, and right of property and right of possession, or either of them, found in defendant—damages assessed and judgment.
7. Verdict and judgment in favor of plaintiff for part of the articles, and in favor of the defendant for part.

SEC. I. GENERAL DIRECTIONS AS TO THE FORM OF VERDICTS AND JUDGMENTS IN REPLEVIN.

What has been heretofore said^a as to the entry of the finding of the jury upon the issues made by the pleadings, is applicable to the form of verdicts in Replevin, and need not be repeated here.

Where the jury find for the plaintiff upon an issue made by the pleading, or upon inquiry of damages after judgment by default, they assess damages for the illegal detention; for which, with costs of suit, judgment is rendered.^b

If the plaintiff discontinues his suit, or becomes nonsuit, or judgment is rendered against him on demurrer, or if he otherwise fails to prosecute his suit to final judgment, the defendant may call a jury to inquire into his right of property and right of possession; and if they find either in his favor, at the time

(a) Ante, p. 935.

(b) Swan's Stat. 786, sec. 7.

For Plaintiff.

the suit was commenced, they assess such damages as they think proper; for which, with costs, judgment is entered against the plaintiff.^c

Where the jury find the issue for the defendant, they also find whether he had the right of property, or the right of possession only when the suit was commenced; and if they find either in his favor, they assess such damages as they think proper.^d In such case, if the jury find the ownership of the property in the defendant, the damages will be assessed according to the value of the goods.^e Where, however, property is replevied from a sheriff, holding it under execution, and the issue be found for the defendant, if the value of the property be greater than the amount due on the execution, the rule of damages is the amount of the execution, with the interest and costs thereon; but if the value of the property be less than the amount due on the execution, then the damages will be assessed at the full value of the property.^f

Where the suit is brought for several articles, and the jury find for the plaintiff as to part of the articles, and for the defendant as to part, the jury will assess for the plaintiff damages for the detention of his part; and will also find, whether the right of property, or possession only, was in the defendant to the other articles, and assess the damages of the defendant accordingly. Upon such a verdict, separate judgments will be given, for each party, for the amount of damages found by the jury, and judgment against the plaintiff for the defendant's costs, and judgment against the defendant for the plaintiff's costs.^g

Where there are several pleas, charging the property to belong to several persons, a general verdict for the defendant should also specify whether the defendant has the right of property or the right of possession only, otherwise the judgment will be erroneous.^h

SEC. II. FORMS OF VERDICTS AND JUDGMENTS IN REPLEVIN.

1. *Verdict and Judgment for Plaintiff on plea of Non detinet—Damages assessed by Jury.*

A. B. }
v. } In Replevin.
C. D. }

This day came the parties by their attorneys, and thereupon came a jury, to wit, E. F., [&c.] who being empannelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the said C. D. doth detain the goods and chattels of the said A. B., in manner and form as the said A. B. hath complained against him; and they assess the damages of the said A. B., by reason of the premises, to ——— dollars. Therefore it is consid-

(c) Swan's Stat. 875, sec. 5.

(d) Swan's Stat. 786, sec. 6.

(e) Wright's Rep. 593, 645.

(f) 17 Ohio Rep. 154; 18 Ohio Rep. —.

(g) 9 Ohio Rep. 72.

(h) 7 Ohio Rep. (Part 2) 232.

For Plaintiff and Defendant.

ered, that the said A. B. recover of the said C. D. the said sum of — dollars, his damages aforesaid, in form aforesaid assessed, and also his costs herein expended, taxed to — dollars.

2. *Verdict and Judgment for Plaintiff, on Default—Damages assessed by Jury.*

A. B. }
v. } In Replevin.
C. D. }

This day came the said A. B. by his attorney, and the said C. D., though solemnly called, came not, but made default; whereupon it is considered, that the said A. B. ought to recover his damages against the said C. D., by reason of the premises, but because the damages are to the court here unknown, therefore let a jury come; and thereupon a jury being called, came, to wit, E. F., &c., who being empanelled and sworn to inquire of the damages sustained by the said A. B., by reason of the wrongful detention of the goods and chattels in the said declaration mentioned, upon their oaths do assess the same to — dollars. Therefore, &c. [*Conclude as in form No. 1, ante p. 982.*]

3. *Damages assessed and Judgment for Defendant, on Discontinuance—Right of Property (or Right of Possession, &c.) found in Defendant.*

A. B. }
v. } In Replevin.
C. D. }

This day came the parties by their attorneys, and thereupon the said A. B. discontinues his suit;* whereupon the said C. D. demands a jury, as well to inquire into his right of property and right of possession in the goods and chattels in the said declaration mentioned, as to assess his damages in the premises; and thereupon a jury being called, came, to wit, E. F., &c., who being duly empanelled and sworn in that behalf, upon their oaths do say, that at the commencement of this suit *the right of property*, or, *the right of possession*, [*or both, as the case may be*] in the said goods and chattels, in the said declaration mentioned, was in the said C. D., and they assess the damages of the said C. D., by reason of the premises, to — dollars. Therefore it is considered, that the said C. D. recover of the said A. B. the said sum of — dollars, his damages aforesaid, in form aforesaid assessed, and also his costs herein expended, taxed to — dollars.

CHAPTER XXVII.

VERDICTS AND JUDGMENTS IN EJECTMENT.

1. Judgment by Default against the Casual Ejector.
 2. Verdict and Judgment for the Plaintiff.
 3. Verdict and Judgment for the Defendant.
 4. Verdict and Judgment where part only is recovered.
-

1. *Judgment by Default against the Casual Ejector.*

John Doe ex dem. A. B. }
v.
Richard Roe. }

This day came the said John Doe, by Mr. S., his attorney; and the said Richard Roe, though solemnly called, came not, but made default; therefore, it is considered, that the said John Doe recover against the said Richard Roe his said term yet to come in the tenements aforesaid, with the appurtenances.

2. *Verdict and Judgment for the Plaintiff.*

The Lessee of A. B. }
v.
John Smith. }

This day came the parties by their attorneys, and thereupon came a jury, to wit, E. F., [&c.,] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the said John Smith is guilty of [the trespass and ejectment, or, the several trespasses and ejectments,] laid to his charge, in manner and form as the said John Doe hath complained against him, and they assess the damages of the said John Doe, by reason thereof, to *one cent*; therefore it is considered, that the said John Doe recover against the said John Smith his said [term, or terms,] yet to come of and in the tenements aforesaid, with the appurtenances, and also his said damages by the jurors aforesaid assessed, together with his costs herein expended, taxed to ——— dollars.

For Plaintiff, and Defendant.

3. *Verdict and Judgment for the Defendant.*

The Lessee of A. B. }
 v. }
 John Smith. }

This day came the parties by their attorneys, and thereupon came a jury, to wit, E. F., [&c.,] who being empanelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say, that the said John Smith is not guilty of the trespass or ejectment laid to his charge in manner and form as the said John Doe hath complained against him; therefore it is considered, that the said John Smith go hence without day, and recover of the said A. B. [*the lessor of the plaintiff*]* his costs herein expended, taxed to — dollars.

4. *Verdict and Judgment where part only is recovered.*

Commence as before,] who being empanelled, [&c.] As to all that part of the tenements, with the appurtenances, in the said declaration mentioned within the metes and bounds following, that is to say, beginning, [&c., *description*,] say upon their oaths that the said John Smith is guilty of the trespass and ejectment [*or, trespasses and ejectments*] above laid to his charge, in manner and form as the said John Doe hath above complained against him; and they assess the damages of the said John Doe, by reason thereof, to one cent; and as to the residue of the tenements, with the appurtenances, in the said declaration mentioned, the jurors aforesaid, upon their oaths aforesaid, say that the said John Smith is not guilty of the trespass and ejectment [*or, trespasses and ejectments*] above laid to his charge; therefore it is considered, that the said John Doe do recover against the said John Smith his said term [*or, terms*] yet to come of and in all that part of the tenements, with the appurtenances, in the said declaration mentioned within the metes and bounds following, that is to say, beginning, [&c., *same description as in the verdict*,] and also his damages by the jurors aforesaid, in form aforesaid, assessed; together with his costs herein expended, taxed to — dollars; and as to the residue of the tenements, with the appurtenances, in the said declaration mentioned, whereof the said C. D. is acquitted in form aforesaid, that the said C. D. go hence without day, &c.

CHAPTER XXVIII.

JUDGMENT, &c., FOR COSTS.

SECTION I. WHO TO RECOVER COSTS, AND AGAINST WHOM.

1. General rule.
2. When the amount recovered is less than one hundred dollars.
3. When the recovery is less than five dollars.
4. When some of the defendants obtain a verdict.
5. In suits brought for the use of a third person.
6. In suits upon negotiable instruments.
7. Upon plea in abatement or demurrer.
8. When the defendant omitted to set off in a previous action.
9. When there has been a tender, &c.
10. When the defendant calls a jury.
11. In suits against an executor or administrator.
12. Upon appeals from a justice where there was no jury below.
13. Upon appeals from a justice where there was a jury below.
14. On arrest of judgment.
15. On Certiorari to the Court of Common Pleas.
16. In Error to the Supreme Court.
17. In Error to the Court in Bank.

II. HOW TAXED AND ENTERED IN THE JUDGMENT.

III. RETAXATION OF COSTS.

IV. REMEDY OF PARTIES AND OTHERS TO WHOM COSTS ARE DUE.

1. Judgment against surety for costs.
2. When execution can issue for costs on continuances, amendments, &c.; and for the benefit of third persons to whom they are due.

Who to recover, and against whom.

SEC. I. WHO TO RECOVER COSTS, AND AGAINST WHOM.

1. *General Rule.*

The party recovering judgment recovers his costs, unless otherwise provided by law.^a

Perhaps there is no exception to this rule where the judgment is for the defendant.^b

But in many cases the statutes provide that the plaintiff shall not recover costs; in which case, each party pays his own costs. In other cases, the statutes permit the defendant to recover costs, and then a judgment is rendered against the plaintiff for the costs of the defendant, and the plaintiff in such case pays all the costs.

2. *When the amount recovered is less than one hundred dollars.*

In general, when a suit is brought in the Court of Common Pleas, and the recovery is less than one hundred dollars, each party pays his own costs. The statute provides that if a person prosecute a suit for any debt, demand, or liability, of which a justice of the peace has jurisdiction, in any other court, and do not obtain a verdict or judgment for debt or damages, which, without costs, shall amount to one hundred dollars, such person shall not recover costs.

As the recovery of costs depends upon the jurisdiction of justices of the peace, it is proper to give here a brief summary of their jurisdiction.

In general, they have jurisdiction of all civil actions, where the amount of the debt or damages does not exceed one hundred dollars.^c

The exceptions to this general rule are the following:

1. No suit can be maintained before a justice on a contract for the sale of real estate. But actions upon contracts relating to rent, or to the clearing of land, or to repairing, or to keeping in repair, and the like, come within the jurisdiction of justices.^d

2. A justice has no jurisdiction (except in an action of trespass,) where the title to lands and tenements may be drawn in question: that is, where it is necessary for the plaintiff (in the first instance, and to make out his cause of action) to show some title, by possession or otherwise, to land.^e

3. A justice of the peace has no jurisdiction over an action of slander, or ejectment, or a civil action for an assault and battery, or a suit for a malicious

(a) Swan's Stat. 688 § 144.

(b) Id. 683 § 68.

(c) Id. 526 § 107.

(d) Id. 506 § 1.

(e) Id. 525 § 106; 13 Ohio Rep. 43.

(f) 15 Ohio Rep. 483, 486; 4 Ohio Rep. 200; see 7 id. (part 2,) 230; Swan's Stat. 525 § 106.

Who to recover, and against whom.

prosecution; nor can public officers be sued by civil action before a justice for misconduct,^g except constables and justices in certain specified cases.^h

In an action, however, of trespass on real estate, if, in the declaration the plaintiff claim as damages more than one hundred dollars, and recovers less than one hundred dollars, he will, notwithstanding, be entitled to his costs.ⁱ

So, where suit is brought in the Court of Common Pleas for a debt or demand of one hundred dollars or upwards, and it is reduced by set off to less than one hundred, the plaintiff is entitled to costs; but if so reduced by payments made before suit, the plaintiff cannot recover his costs; for, in the latter case, the demand in fact was less than one hundred, and he should have sued before a justice; whereas, in the former case, he could not safely sue for less than his whole demand, for the defendant might or might not give in evidence his set off.

3. *When the Recovery is less than five dollars.*

Costs cannot be recovered in an action for an assault, an assault and battery and false imprisonment, malicious prosecution, libel, slander, actions on the case for a nuisance, or against justices of the peace for misconduct in office, if the damages found are under five dollars.^j

4. *When some of the Defendants obtain a Verdict.*

Where several persons are sued in trespass, for an assault and battery, false imprisonment, or in ejectment, such of them as are acquitted by verdict, recover their costs, in like manner as if the verdict had been generally against the plaintiff.^k

So, where the makers and indorsers of a note, due bill or bill of exchange, are jointly sued, under the statute authorizing such joint action, the defendants, who may be acquitted, recover their costs.^l

5. *In Suits brought for the use of a Third Person.*

There is a large class of cases prosecuted in the name of the state on the relation of, or for the use of a third person or corporation; and also actions by nominal plaintiffs for the use and benefit of a third person or corporation. In all such cases, if the defendant recovers, and it appears from the record that the

(g) Swan's Stat. 525 § 106.

(h) Id. 524 § 101; Id. 531 § 116.

(i) 2 Ohio Rep. 95.

(j) Swan's Stat. 666, § 78; 3 Ohio Rep. 380.

(k) Id. Stat. 662, § 68.

(l) 42 Vol. Stat. 72; 43 Vol. Stat. 67.

Who to recover, and against whom.

action was prosecuted for the use or benefit of a third person or corporation, the defendant may, if he desire it, take judgment for the costs against such re-lator or third person.¹

So in actions of ejectment, judgment for costs may be taken against the lessor of the plaintiff, instead of the nominal plaintiff.²

An infant plaintiff is not liable for costs, but only his *procchein amie*; and if he refuses to pay them on demand, attachment lies.³

6. *In Suits upon Negotiable Instruments.*

If the holder of a "note, due bill or bill of exchange,"⁴ commences and prosecutes separate actions against the makers and indorsers, he cannot recover costs in more than one of the actions;⁵ and the defendants who are acquitted in a joint action recover their costs.

7. *Upon Plea in Abatement or Demurrer.*

When a plea in abatement is adjudged insufficient, the plaintiff recovers full costs to the time of overruling the plea.⁶

When any other plea is adjudged insufficient, costs are thereupon awarded by the court.⁷

When a special demurrer is overruled, cost are usually taxed and allowed the opposite party to the time of overruling the demurrer.⁸

8. *Where the Defendant omitted to Set Off in a previous Action.*

Where the plaintiff is indebted to the defendant in any debt, claim or demand, which is liquidated, and fails to have it set off, the defendant cannot afterwards, in a suit for the same, recover any costs; unless it appear to the court that it was not in the power of such defendant, in the former suit, to produce the proper evidence at the time of the trial.⁹

9. *Where there has been a Tender, &c.*

Where tender has been made,¹⁰ or where the plaintiff proceeds in a cause

(l) 47 vol. Stat. 16; 43 vol. Stat. 94, § 8.

(m) *Id. Ib.*

(n) Tidd 71, 72.

(o) Do these words of the Statute include a single bill or note under seal, or a negotiable bond?

(p) 43 vol. Stat. 72; 43 vol. Stat. 67.

(q) Swan's Stat. 661, § 65.

(r) *Id. Ib.* § 63.

(s) *Id.* 662, § 67.

(t) Swan's Stat. 851, § 2.

(u) Swan's Stat. 993.

Who to recover, and against whom.

after the amount due, and costs are brought into court,* or where there is tender of amends for an involuntary trespass," costs will be awarded against the plaintiff.

10. *Where the Defendant calls a Jury.*

The jury fee is paid to the sheriff by the party who obtains the verdict, and is afterwards taxed in favor of the party who obtains a judgment.²

In actions upon written contracts for sums of money certain, where the plaintiff offers to submit the case to the court, and the defendant calls a jury, the defendant must advance and pay the jury fee, and must pay all expenses incurred by calling such jury, unless by plea or notice, he set up and sustain, on the trial, a defence of payment, set off, release, fraud, failure or want of consideration.⁷

The costs of a struck jury,⁸ and where a jury is ordered to view the subject in controversy⁹ has already been noticed.

11. *In Suits against Executors and Administrators.*

Where the suit is at common law against an executor or administrator, no costs can, in general, be recovered, except in the following cases, namely:

1. Where the demand was presented within one year after the executor or administrator gave bond for the discharge of his trust, and its payment was unreasonably resisted or neglected.^a

2. The statute authorizes executors and administrators to refer disputed claims to arbitration.^b Where a demand against the estate is presented to the executor or administrator, within one year after he gave bond for the discharge of his trust, and the creditor proposed to refer it for adjustment, and the executor or administrator refused to do so, costs may be recovered by the creditor in a suit on the claim.^c

The court will order the costs in the two cases above mentioned to be levied of the property of the defendant, or of the deceased, as may be just, having reference to the facts that appeared on the trial.^d

Where an appeal is taken from the decision of commissioners upon an insolvent estate, costs are taxed as in ordinary cases of appeal from the judgment of a justice.^e

Where, however, the executor or administrator acts in the place of commis-

(v) Id. 660, 661, ante, p. 608.

(w) Id. 662.

(x) Swan's Stat. 401, §31.

(y) Swan's Stat. 622, §159.

(z) Ante, p. 857, 858.

(a) Swan's Stat. 355, §96.

(b) Id. 353, §86.

(c) Id. 355, §96.

(d) Id. lb.

(e) Swan's Stat. 378, §308.

Who to recover, and against whom.

sioners upon an insolvent estate, and a claim is referred to arbitrators for adjustment, or a suit is brought upon a claim disallowed by the executor or administrator, the question who shall pay the costs, whether the estate, the executor or administrator, personally, or the creditor, is left to the discretion of the referees or court who decide upon the claim.^f

Where suit is brought on the administration bond, for not filing the final account of the estate, if it appear that the omission did not occur from neglect or unreasonable delay to settle the estate or file the account, the defendants will recover their costs; and in no case brought for such breach, can the plaintiff recover more costs than damages.^g

12. *Upon Appeals from a Justice where there was no Jury below.*

If the party in whose favor judgment was rendered below, appeal, and do not recover a greater sum than the amount for which judgment was rendered below, besides costs and the interest accruing thereon, such appellant pays all the costs of the appeal, and judgment is entered accordingly.^h

If a plaintiff appeal from a judgment in his favor, and recover a greater sum than one hundred dollars, besides interest and costs, he cannot, in general, recover costs on such appeal.ⁱ

13. *Upon Appeals from a Justice when there was a Jury below.*

The recovery of costs on appeal in these cases depends upon the common rules just stated, except under the following circumstances, namely:

If the plaintiff recovered below less than twenty dollars, or the verdict was against him, and he appealed, and does not recover a larger sum than twenty dollars in court, exclusive of interest since the judgment below, he will be adjudged to pay all costs accruing in the Court of Common Pleas, including a fee of five dollars to the attorney of the defendant.^j

If the defendant recovered below less than twenty dollars, or the verdict was against him, and he appealed, and does not recover a larger sum than twenty dollars, he in like manner will be adjudged to pay the costs accruing in the appellate court, and a fee of five dollars to the attorney of the plaintiff.^k

14. *On Arrest of Judgment.*

The party prevailing recovers his costs.^l

(f) *Id.* § 290, § 290.

(g) 44 vol. Stat. 76.

(h) Swan's Stat. 514, § 48.

(i) *Id.* 515, § 54.

(j) 43 vol. Stat. 57; 44 vol. Stat. 64.

(k) *Id.* *Ib.* Perhaps I have mistaken the provisions of these statutes, and therefore recommend the reader to examine them.

(l) Swan's Stat. 681 § 122.

How costs taxed and entered in the Judgment.

15. *On Certiorari to Common Pleas.*

If the judgment below is affirmed, the costs on certiorari proceedings follow, and is rendered against the plaintiff in certiorari;^m if reversed judgment for costs up to the time of the reversal, is renderedⁿ against the defendant in certiorari.

16. *In Error to Supreme Court.*

The judgment for costs rendered in the Supreme Court upon the affirmance or reversal of a judgment, only embraces the costs accruing on error, and none of the costs which accrued in the court below.^o

When the judgment is reversed, the plaintiff in error recovers his costs in error; when reversed in part and affirmed in part, the costs are equally divided.^p

17. *In Error to Court in Bank.*

The same rule prevails as in error to the Supreme Court.^q See *supra*.

SEC. II. HOW TAXED AND ENTERED IN THE JUDGMENT.

The costs made by each party are to be kept separate, and taxed and entered on record separately.^r

When either party recovers judgment, and is by law entitled to recover costs, those costs only which are occasioned by the prevailing party are, in general, carried into the judgment; and the costs of the party against whom the judgment is rendered, must be stated in a separate clause of the record, or docket entry.^s

When a plaintiff recovers judgment but is not entitled to recover any costs, no judgment for costs is entered; but when a plaintiff recovers judgment and the defendant is by law entitled to recover costs against the plaintiff, then after the entry of the judgment against the defendant, a judgment is entered for the defendant's costs against the plaintiff.

The costs of the party condemned are endorsed on the execution and collected with the judgment.^t

(m) Id. 516 § 61.

(n) Id. Ib. § 62; Id. 420 § 11.

(o) 16 Ohio Rep. 816.

(p) Swan's Stat. 681 § 122.

(q) Id. 691 § 157.

(r) Swan's Stat. 405 § 48, 49; 406 § 52; 5 Ohio Rep. 276, 287.

(s) Id. Ib.

(t) Id. 406 § 50.

Retaxation — Judgment for the costs against Surety.

Where the sheriff or other officer has omitted to return on the process the particular items of his fees, they cannot be taxed.⁴

SEC. III. RETAXATION OF COSTS.

A motion to retax costs will be granted as a matter of course, to correct any error or omission.⁵

If, before the retaxation, the wrong amount has been entered in the judgment, the record of the action of the court on retaxation, will control the amount inserted in the judgment.⁶

Upon granting a motion for retaxation, the court, in general, if requested, refer the matter to a special master to report, and upon the report coming in exceptions may be filed for the decision of the court.

The motion sometimes directs how the costs shall be retaxed, as thus:

On motion of the defendant by his attorney, it is ordered, that the clerk re-tax the costs in this case, charging to the defendant the costs of his own witnesses only, and to the plaintiff all other costs; and that execution issue accordingly.

SEC. IV. REMEDY OF PARTIES AND OTHERS, TO WHOM COSTS ARE DUE.

1. *Judgment against Surety for Costs.*

After final judgment, the defendant, his executors or administrators, or any other person having a right to any costs, may, on motion, and on ten days' notice, enter up judgment in the name of the defendant, his executors or administrators, against the security, for the amount of costs adjudged against the plaintiff, or so much thereof as may remain unpaid.⁷

Form of Notice.

A. B. }
v. } In ——— Com. Pleas.
C. D. }

To Mr. J. S., Security for Costs in the above Case :

This is to give you notice, that on ——— next, at 10 o'clock in the morning, or as soon thereafter as counsel can be heard, the said Court of Common Pleas will be moved to enter up judgment, in the name of the said defendant, [*or in the name of M. N., his executor or administrator, as the case may be*] against

(t) Swan's Stat. 408 § 40.

(u) Swan's Stat. 408 § 38.

(v) § Ohio Rep. 276, 337.

(w) Swan's Stat. 652, sec. 22.

Remedy of Third Persons.

you, as security for costs in the above case, for ——— dollars, the amount of costs [*or for ——— dollars, residue of costs*] adjudged against the said A. B., at the ——— term of said court, A. D. ———, and still remaining due and unpaid.

Dated, &c.

[*Signed by the Defendant, his Executor or Administrator, or other person, having right to the Costs.*]

Affidavit of Service of Notice.

G. H. of, [&c.] makes oath and says, that on the ——— day of ———, A. D. ———, he served the *within* notice upon the *within* named J. S., by delivering to him in person a true copy thereof at ———.

G. H.

Sworn to, &c.

Form of Judgment against Security for Costs.

A. B. }
v. } On Motion.
C. D. }

This day came the said C. D., [*or other person entitled to the costs*] by Mr. O. his counsel, and showed to the satisfaction of the court, that the said J. S. was security for costs in a certain action, heretofore pending in this court, wherein A. B. was plaintiff and the said C. D. was defendant, and wherein judgment for costs was rendered against the said A. B. at the term of ——— last past, and that of said costs the amount of ——— dollars still remains due and unpaid; and it further appearing, to the satisfaction of the court, that the said J. S. has been duly notified of this motion, therefore it is considered, that the said C. D. recover against the said J. S. the said sum of ——— dollars, the costs aforesaid, yet due and unpaid, and that he have his execution therefor.

2. *When Executions can issue for Costs on Continuances, Amendments, &c., and for the benefit of Third Persons, to whom they are due.*

If the party recovering judgment neglects to sue out execution immediately, or after execution has been returned without satisfaction of costs, the Clerk of the Court of Common Pleas may, for his own benefit, or must, at the instance of any person entitled to fees in the bill of costs taxed against either party, and by order of the court, issue, against the party indebted to such clerk or other person for such fees, whether plaintiff or defendant, and whether the cause is in the Common Pleas, by mandate from the Supreme Court or otherwise, an execution, to compel the party to pay his own costs.*

(x) Swan's Stat. 405, 406, secs. 51, 52. For the form of the writ in such case, see post, Chap. 30.

Remedy of Third Persons.

A standing general order of the courts, directing the clerk to issue execution for costs, will authorize him, without any special order, to issue such execution.⁷

So, the costs adjudged against either party, on continuances, amendments, or under any special rule, may be collected at any time after judgment, or order of the court awarding such costs, by execution issued from the court wherein such order may be made.*

(7) 11 Ohio Rep. 306.

(*) Swan's Stat. 406, sec. 58. For the form of the writ in such case, see post, Chap. 30.

CHAPTER XXIX.

JUDGMENT, AND ITS INCIDENTS.

1. Judgment in actions against the several parties to a Bill of Exchange, Due Bill or Note.
 2. Judgment against joint Debtors where some are Sureties.
 3. Setting off Judgments.
 4. Amendment of Judgments.
 5. Setting aside Judgments at a subsequent Term.
 6. When the lien of a Judgment commences, and upon what Estate it operates.
 7. Priority as between Judgment Liens and Mortgages.
 8. When a Judgment becomes dormant, and its effect.
 9. Satisfaction.
-

1. *Judgment in Actions against the several parties to a Bill of Exchange, Due Bill or Note.*

In actions under the statute^a against the several parties to a bill or note, judgment may be rendered for the plaintiff against some, or one or more defendants, and also in favor of one or more of the defendants, against the plaintiff, according to the rights or liabilities of the parties.^a

2. *Judgment against Joint Debtors where some are Sureties.*

Where a judgment is rendered upon a bond, sealed bill, promissory note or other instrument of writing, in which two or more persons are jointly, or jointly and severally bound, and it shall be made to appear by parol or other testimony, that one or more of the persons so bound, signed the same as surety or bail for a co-defendant, the clerk, in recording the judgment thereon, must certify which of the defendants is principal debtor, and which are sureties or bail.^b So, in all contracts for the payment of money to banks or bankers, sureties in fact, known to the parties to be such at the time such contracts were

(a) 42 vol. Stat. 72; 43 vol. Stat. 67.

(b) Swan's Stat. 481, §26.

Setting off Judgments — Amendment.

made, may be proved to be, and shall be, considered as sureties in all courts, and have all the privileges, and be subject to all the liabilities, of sureties, any thing in the contract expressed to the contrary notwithstanding.^o In all contracts, therefore, for the payment of money to banks or bankers, the sureties in fact, among other rights, are entitled to be certified by the clerk as sureties.

The clerk of the court in issuing execution on a judgment, where any of the defendants are certified as sureties, must insert in the execution a command to the officer, to make the judgment of the property of the principal debtor, and for want thereof, then to make the judgment of the property of the sureties. The property, real and personal, of the principal debtor, within the jurisdiction of the court, must in such case be exhausted, before any of the personal or real estate of the sureties can be taken in execution.^d

3. Setting off Judgments.

Judgments recovered in the same court, or in different courts, may be set off against each other, on motion; and the court will direct the balance only, due after such set off, to be collected by execution.^e

Where the judgments are in different courts, either court may direct the set off;^f and the Supreme Court of New York will, on motion, direct a judgment in the Common Pleas to be set off against a judgment of their own court.^g

So, in New York, the set off will be allowed to the assignee of a judgment, provided the assignee purchased absolutely, and has a beneficial interest in the judgment.^h But in Ohio it is held, that judgments cannot be set off, on motion, unless between the same parties and in the same right.ⁱ

A party, to have the right of set off, on motion, must be the absolute owner of the judgment, in his own right.^j

4. Amendment of Judgments.

During the same term in which the judgment is signed, it is amendable in form and substance.^k

In regard to amendments after the term, the courts of Ohio have established

(c) 43 vol. Stat. 67.

(d) Swan's Stat. 482, §26.

(e) 4 Ohio Rep. 90; 3 Caines' Rep. 190; 1 Johns. 144; 14 Id. 68; 8 Cowen, 126; 6 Id. 568; 2 Hill, 364.

(f) 1 Johns. Ch. Rep. 94; 3 Caines' Rep. 190; 1 Johns. 146.

(g) 2 Hill, 364; 8 Cowen, 126; 3 Caines' Rep. 190.

(h) 7 Cowen, 489, 490. Nor is it necessary in New York, that the judgments should be in the same right; 14 Johns. 68; 4 Hill, 559; see 5 Cowen, 231; 5 Wend. 342; 3 East, 149.

(i) 4 Ohio Rep. 90.

(j) 1 Hill, 218.

(k) 3 Bl. Com. 407; 2 Ohio Rep. 246.

Setting Aside.

a very strict rule, and one which does not work well in practice. They hold that a judgment cannot, in general, be amended in substance at a subsequent term;¹ but may be set aside for irregularity.

And yet, where process is issued against two, and served upon one of them, and a verdict and judgment is taken against both, the court, at a subsequent term, will allow the judgment to be amended, by striking out the name of the defendant not served with process; it being considered a mere clerical mistake.²

So, the mistakes of a clerk in transcribing minutes from the judges' docket, may be corrected:—Thus, a record not showing how a nonsuit came to take place, may be so amended from the judges' minutes, as to show that the nonsuit was ordered by the court.³

So, when the clerk in the entry of the judgment, transposed the names of the parties, so that the judgment was against the plaintiff instead of being in his favor, the court ordered it to be corrected, as a mere clerical mistake.

It would seem from these cases, that a mistake in substance, in a judgment, may be corrected or amended, provided it be traced to the clerk, and there be something to amend by. Indeed, since these decisions, and the legislation in relation to amendments, the Court in Bank will probably adopt the general rule recognized in England and elsewhere, that when it is apparent that substantial justice requires it, an amendment of a judgment in form or substance will be allowed.⁴

Form of Order for the Amendment of a Judgment.

This cause came on to be heard upon the motion of the plaintiff to amend the verdict and judgment herein, and was argued by counsel; on consideration whereof, it is ordered, that the plaintiff be at liberty to amend the said judgment by striking out the name of *John McConnell*, so as to make the same conform to the pleadings and issue, and to the manifest intent and operation of the verdict.

5. *Setting aside Judgments at a Subsequent Term.*

It is said to be one of the plain and accustomed remedies of a court of law, to afford on motion, full and adequate relief against judgments irregularly or improperly obtained, where there is no fault or negligence on the part of the judgment debtor.⁵

(1) 1 Ohio Rep. 375; 3 Ohio Rep. 15, 436, 518. In England and New York a very liberal discretion in allowing amendments at any stage of the proceedings is now exercised, whenever required by substantial justice. 3 Bl. Com. 406; 6 Cowen 606; 2 Stra. 786; 4 M. & S. 94; 14 Johns. 219; 17 Id. 85; 19 Id. 244.

(m) 2 Ohio Rep. 81.

(n) 6 Ohio Rep. 490.

(o) See Swan's Stat. 687, § 141; 43 Vol. Stat. 114.

(p) 7 Ohio Rep. (Part 2,) 175; 3 Ohio Rep. 519.

Its Lien, and-upon what Estate it operates.

Thus, where one partner, without authority from his co-partner, executes a warrant of attorney under seal, to confess a judgment in the name of the firm, and a judgment is accordingly confessed; the partner whose name was soused without authority, may be relieved at a subsequent term, on motion to set aside the judgment.^a

So, where an attorney has entered an appearance of a person, not served with process, and without authority, the proper remedy is, by motion, to set aside the judgment.^r

Form of Order setting aside a Judgment.

A. B. }
v. } In Assumpsit. Judgment, — Term, 18 —.
C. D. }

This day came the said C. D. by Mr. O., his counsel, and moved the court to set aside the judgment herein rendered at our [last] term, [for the following reasons: 1st: *or say* for reasons on file,] and [thereupon it is ordered, that a copy of this entry be served on the said A. B. at least — days before the same shall be heard; *or say* also filed herein an affidavit by which it appears to the satisfaction of the court, that the said A. B. was duly notified, on the — day of —, 18—, that this motion would be now made.

A. B. }
v. } Motion to set aside Judgment.
C. D. }

This cause came on to be heard upon the motion of the said C. D. to set aside the judgment herein; [*Here state that it appears to the satisfaction of the court that a copy of the preceding entry was served &c. unless notice of the motion was given and proved as above.*]

The said motion was argued by counsel, on consideration whereof, and it appearing to the court that [&c. *Here state the grounds upon which the judgment is set aside,*] it is ordered, that the said judgment be, and the same is set aside and held for naught; and this cause is reinstated upon the trial docket and set down therein for further proceedings. Continued.

6. *When the lien of a Judgment commences, and upon what Estate it operates.*

The existence, validity and extent of a judgment lien, are matters purely legal, dependent upon statutory provisions.^a

The statute provides,^t that the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first

(q) 11 Ohio Rep. 417.

(r) 3 Ohio Rep. 519.

(s) 3 Ohio Rep. 514; 6 Id. 156.

(t) Swan's Stat. 468, sec. 2.

Priority,⁵ as between Judgment Liens and Mortgages.

day of the term at which judgment shall be rendered, in all cases where such lands lie within the county where the judgment is entered; and all other lands of the debtor, shall be bound from the time they shall be seized in execution.

A judgment is not a lien upon goods or chattels, nor upon land acquired after the rendition of the judgment. The lien in such case exists from the time of levy.⁶

The lien does not operate upon a mere equitable estate in land; for such an estate is not liable to be levied upon or sold upon execution.⁷

So, it is said, that although it is clear a mere possessory interest in land (that is, where the debtor is in possession, without the right of possession or property) may be levied upon and sold, yet, the judgment is not a lien upon the possessory interest; and, in such case, a lien is created by levy only.⁸

Judgments are liens upon permanent leasehold estates, as upon other real estate.⁹

Formerly, a judgment by confession, operated as a lien upon land from the first day of the term;¹⁰ but now by statute, which took effect July 4, 1846, the lien of such judgment commences on the day it is actually entered, and not before.¹¹

Where judgment is taken on a bond for a penalty, and the cause continued, and at a subsequent term the amount due in equity is found by the court, the lien of the judgment is only from the first day of the term at which the amount due in equity is ascertained, and then for that amount only.¹²

7. *Priority as between Judgment Liens and Mortgages.*¹³

As between a judgment and a mortgage, the lien of a judgment exists without any execution being issued or levy being made, for the period of five years from the time the judgment was rendered.

A mortgage becomes effectual as a mortgage and a lien, from the time it is delivered to the recorder to be recorded, and not before.¹⁴

A lien therefore of a judgment, overreaches a prior, unrecorded mortgage;¹⁵ and a mortgage delivered to the recorder for record on the first day of the court, and before the court opens, will prevail over a judgment rendered on the same day.¹⁶

Where a mortgage, having but one subscribing witness, is otherwise duly

(u) 1 Ohio Rep. 281; 4 Id. 92; 2 Id. 224.

(v) 1 Ohio Rep. 257, 261.

(w) 8 Ohio Rep. 21.

(x) 13 Ohio Rep. 334.

(y) 14 Ohio Rep. 514.

(z) 44 vol. Stat. 41.

(a) 8 Ohio Rep. 136; 14 Id. 520.

(b) As to the effect of intervening mortgages

upon senior and junior judgments, where execution has not issued within one year after the rendition of the judgments, see the next Chapter.

(c) Swan's Stat. 268; 16 Ohio Rep. 533; 13 Ohio Rep. 148; 14 Ohio Rep. 43.

(d) 14 Ohio Rep. 428.

(e) 16 Ohio Rep. 533. Quere, as to the correctness of this decision?

When Dormant, and its Effect.

executed, acknowledged and recorded, a court of equity will regard it, as between the parties, a good and valid mortgage; but it cannot be reformed in chancery so as to defeat the lien of judgments rendered against the mortgagor, after such mortgage was made and recorded.^f

A mortgage given to indemnify a person against loss or damage growing out of indorsements thereafter to be made by the mortgagee for the mortgagor, is valid, and constitutes a lien preferable to a lien of a judgment rendered after such indorsements have been made.^g But, it seems, if a judgment had been rendered after the mortgage was recorded, but before the indorsements were made, the lien of the judgment would be paramount to the mortgage.^h

Where a mortgage is made within the five years next after the rendition of a judgment, the judgment being elder, has priority; but if the judgment lies dormant during the five years, its priority is thereby lost, and the mortgage takes the estate.ⁱ Of course if, after a judgment becomes dormant, and before its revival, a mortgage is executed, the mortgage obtains a priority.

When mortgaged premises are sold in parcels by the mortgagor, the mortgagee will be compelled to exhaust the part last sold, and so on, in inverse order; and in such case a purchaser at a judicial sale will overreach a purchaser from the mortgagor who made his purchase while the lien of the judgment existed.^j

The vendor of land, by taking a mortgage upon the land to secure the payment of the purchase money, does not extinguish his prior equitable lien; and the lien of a judgment creditor obtained between the date of the mortgage and the time when it was recorded, though paramount as against the mortgage, will be postponed to the vendors equitable lien.^k

8. *When a Judgment becomes dormant, and its effect.*

The statute provides^l that if execution be not sued out without five years from the date of a judgment, or if five years intervene between the date of the last execution and the time of suing out another execution, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor.

A judgment thus dormant, is presumed to be satisfied: so that no execution can be issued upon it until it is revived by scire facias, or renewed by judgment upon it in an action of debt.^m

A purchaser of land from heirs acquires a title superior to the lien of a

(f) 16 Ohio Rep. 59. See *Lake v. Doud*, 10 Ohio Rep. 415, and 7 Ohio Rep. (Part 1) 21, 225.

(g) 15 Ohio Rep. 253.

(h) *Id. Ib.*, per Нитенсоок, J.

(i) 10 Ohio Rep. 403.

(j) 14 Ohio Rep. 365.

(k) 17 Ohio Rep. 500.

(l) Swan's Stat. 671 § 101.

(m) 4 Ohio Rep. 459; Swan's Stat. 671 § 102.

Satisfaction.

judgment creditor of their ancestor, provided the judgment was dormant at the time of the purchase, or became dormant subsequently, even though the judgment was afterwards revived.^a

For, although the revival of a judgment revives the lien, which operates retrospectively, still it operates only upon lands remaining in the possession of the judgment debtor, and not upon lands which have been by him sold and conveyed or mortgaged;^b and therefore, if, while the five years are running, or after the five years have expired and the judgment become dormant, the judgment debtor sells and conveys, or mortgages the land, and the judgment is afterwards revived, the lien on the land previously conveyed or mortgaged, is lost.

As between the judgment debtor and the judgment creditor, the duration of the lien of a judgment is perpetual. If the judgment becomes dormant by lapse of time, the lien sleeps with it; if the judgment be revived, the lien revives also, and prospectively, and so on indefinitely.^c

If a writ of error be sued out and bond given, and execution is thus stayed for five years, and the judgment below is affirmed, execution, it seems, may be taken out without revivor, after the expiration of five years; because the writ of error was a supersedias.^d And it is the same if the execution be tied up by an injunction.

If property be sold on an execution, and more than five years afterwards, the sale, by consent of parties, is set aside, no execution can afterwards issue unless the judgment be revived; and in such case, the judgment being dormant, is not even entitled to money made on a junior judgment.^e

The question whether a revived judgment takes priority of intervening judgments rendered after the former became dormant, has not, so far as I know, as yet been expressly decided.

9. Satisfaction.

The evidence or documents required upon which the courts of this State will enter satisfaction of a judgment, cannot be given, as there is no statute or settled practice upon the subject. In general, satisfaction is entered by consent of the attorney of the judgment creditor given in open court; sometimes it is ordered to be entered upon the presentation of the receipt of the attorney acknowledging the full payment of the judgment; and sometimes the execution on the judgment and the return thereon of money made, or satisfied, is treated by the Court as sufficient evidence upon which to direct satisfaction to be entered.

(a) 15 Ohio Rep. 301.

(c) 5 Ohio Rep. 178; 10 Ohio Rep. 403; 15 Ohio Rep. 301.

(p) 5 Ohio Rep. 178; 15 Ohio Rep. 301.

(q) 4 Ohio Rep. 450.

(r) Id. Ib.

Satisfaction.

Journal Entry of Satisfaction.

A. B.	}	In Assumpsit.	Judgment at — Term, A. D., 18—.
vs.			Damages, \$ —.
C. D.			Costs, \$ —.

This day came the said A. B., by J. R., his attorney, [*or say*, This day came into court the said A. B.] and acknowledged himself satisfied of the above mentioned judgment against the said C. D. Therefore let the said C. D. of the damages and costs aforesaid be acquitted.

CHAPTER XXX.

ISSUING OF FORMS, AND INDORSEMENTS UPON EXECUTIONS, AND WHEN TO BE RETURNED, &c.*

SECTION I. THE EFFECT OF NOT ISSUING AN EXECUTION WITHIN TEN DAYS AFTER THE RENDITION OF THE JUDGMENT.

II. THE EFFECT OF NOT ISSUING AN EXECUTION AND MAKING A LEVY WITHIN ONE YEAR FROM THE TIME OF THE RENDITION OF THE JUDGMENT.

III. GENERAL DESCRIPTION OF EXECUTIONS.

1. Fieri Facias.
2. Venditioni Exponas.
3. Capias ad satisfaciendum.
4. Habere Facias.
5. Execution in Detinue.
6. Special writ of fieri facias for the recovery of costs.

IV. ISSUING OF, AND PRÆCIPUE FOR EXECUTIONS, OTHER THAN A CA. SA.

V. FORMS OF EXECUTIONS.

1. Fieri Facias on a judgment or decree for money in the Common Pleas.
2. The like on mandate from the Supreme Court.
3. Fieri Facias against Principal and Sureties.
4. Fieri Facias where a defendant is made a party by scire facias.
5. Fieri Facias on suggestion of further breaches, after judgment for penalty.
6. Fieri Facias awarded from Common Pleas on Justices' Judgment.
7. Fieri Facias for costs.
8. Fieri Facias after a levy of part.
9. Venditioni Exponas.
10. The like with a fieri facias clause.

(a) As to the issuing of a Capias ad Satisfaciendum see post. Chap. 32.

Effect of not issuing within ten days.

11. Capias ad satisfaciendum.
12. Habere Facias.
13. The like on a Double Demise.
14. In Detinue.

VI. INDORSEMENTS ON EXECUTIONS BY THE CLERK.

VII. WHEN EXECUTIONS MUST BE RETURNED, AND THE RECORDING OF THE RETURNS OF OFFICERS.

SEC. I. THE EFFECT OF NOT ISSUING EXECUTION WITHIN TEN DAYS AFTER THE
RENDITION OF THE JUDGMENT.

Goods and chattels of the judgment debtor are not bound by the judgment but from the time only that they are seized in execution.^b

A preference may sometimes be obtained by one judgment creditor over another, by having execution issued within ten days after the term in which judgment is rendered; for, the statute provides, that when two or more writs of execution against the same debtor are sued out during the term in which judgment is rendered, or within ten days thereafter, and where two or more writs of execution against the same debtor, shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money is not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases, the writ of execution first delivered to the officer shall be first satisfied.^c But these provisions of the statute do not affect any preferable lien, which one or more of the judgments on which such execution issued, may have on the lands of the judgment debtor.

It is said^d that the above mentioned provisions of the statute were intended to apply only to cases where the property is bound from the time when seized in execution; as goods and chattels, and lands not situate in the county where the judgment is recovered.

The statute was not intended to disturb priorities of lien on real estate situate within the county in which the judgments are rendered.

Thus, a judgment voluntarily confessed during a term, and on which execution is issued within ten days, will be postponed to a judgment entered at a subsequent day of the same term in a suit pending on regular process, though no execution be issued or levied on the latter judgment within the ten days;^e for the lien of the judgment by confession commences on the day of its rendition, and a judgment on a suit pending by regular process takes effect as a lien

(b) Swan's Stat. 469.

(c) Swan's Stat. 470 § 4.

(d) See Patton v. Sheriff of Pickaway county,
2 Ohio Rep. 395.

(g) 5 Ohio Rep. 48.

Effect of not issuing and levying within one year.

from the first day of the term, and is consequently prior in its lien; and a judgment prior in lien cannot be postponed by a levy made upon an execution issued within ten days after the term at which judgment was taken, inasmuch as the provision in the statute as to the ten days^b was not intended to apply to cases where there is in fact a priority of lien.

And where two or more judgments have an equal lien, as where they are rendered at the same term, no priority as to real estate within the county is acquired by one of them obtaining a levy upon such real estate within the ten days, but each will stand on the same footing, provided each has a levy within one year from the time of its rendition.¹

SEC. II. THE EFFECT OF NOT ISSUING AN EXECUTION AND MAKING A LEVY WITHIN ONE YEAR FROM THE TIME OF THE RENDITION OF THE JUDGMENT.

The statute provides¹ "that no judgment heretofore rendered, or which may hereafter be rendered, upon which execution shall not have been taken out and levied before the expiration of one year next after the rendition of such judgment, shall operate as a lien on the estate of any debtor, to the prejudice of any other bona fide creditor; but in all cases where judgment has been or may be rendered in the Supreme Court, and a special mandate awarded to the Court of Common Pleas to carry the same into execution, the lien of the judgment creditor shall continue for one year after the first day of the term of the Court of Common Pleas, to which such mandate may be directed; provided, that nothing in this section contained shall be so construed as to defeat the lien of any judgment creditor, who shall fail to take out execution and cause a levy to be made as herein provided, when such failure shall be occasioned by appeal, writ of error, injunction, or by a vacancy in the office of sheriff and coroner, or the inability of such officer, until one year after such disability shall be removed."

It will be perceived that the statute gives a judgment creditor one year from the time of the rendition of his judgment to make his levy, and if he does not cause a levy to be made within the year, he may, though his judgment be eldest, be postponed to a junior judgment which makes a levy within a year from the time of its rendition. And so, it has been repeatedly decided, that an elder judgment not levied within a year after its date, loses its priority as against a junior judgment, levied within a year.²

And, if an elder judgment be levied on certain lands after its year, that is after one year from its rendition, and a junior judgment be levied on the same lands within its year, but after the levy of the elder judgment, the junior judgment has a priority.¹

(h) Swan's Stat. 470, § 4.

(i) 13 Ohio Rep. 334.

j) Swan's Stat. 479, § 23.

(k) 2 Ohio Rep. 65; 3 Ohio Rep. 386; 6 Ohio Rep. 30.

(l) 3 Ohio Rep. 136.

Effect of not issuing and levying within one year.

A levy, however, under the elder judgment, though after its year, if made before the date of the junior judgment, has a priority.^m

It will be perceived that the lien of a junior judgment (on all property not levied upon under the elder judgment within the year,) continues one year after its date, to the exclusion of the elder judgment, provided the junior judgment was rendered before the levy under the elder judgment; for a levy under the elder judgment, though after its year, if made before the junior judgment was rendered, has a priority.

If there are several judgments and no levy made by virtue of either of them within the period of one year from the time of their rendition respectively, they stand on an equal footing, and the one who afterwards first levies, gains a priority.ⁿ

If a levy be made on certain real estate by the elder judgment within its year, this will not prevent a junior judgment obtaining a priority by making a levy upon other property during its year.^o

And where an elder judgment is levied within its year, and after the year the levy is set aside at the instance of the plaintiff, a junior judgment, levied within its year, has a priority.^p

The Court in Bank have adhered so strictly to the law requiring a levy to be made within a year, so as to retain a priority against other levies, that they have held, that, where the court, in pursuance of the statute, order execution against a surety to be stayed, the lien upon his land, as against other judgments levied within their year, is, notwithstanding, lost, unless a levy be made within the year.^q And going into chancery to set aside a fraudulent deed does not excuse a levy within the year.^r

If no levy is made under the elder judgment within its year, and the judgment debtor executes a mortgage to a third person before or after the expiration of such year, and then a levy is made by virtue of a junior judgment within its year, the elder judgment has priority over the junior judgment and the mortgage; and in such case the elder judgment must be first satisfied, then the mortgage, and lastly the junior judgment.^s

(m) 3 Ohio Rep. 136.

(n) *Ib.*; 3 Ohio Rep. 336; 5 Ohio Rep. 398;

(o) 3 Ohio Rep. 136.

(p) 2 Ohio Rep. 395.

(q) 3 Ohio Rep. 135.

(r) 9 Ohio Rep. 142.

(s) 14 Ohio Rep. 318; 16 Ohio Rep. 533. It is somewhat singular that an elder judgment, which by neglect to make a levy within its year, has lost its priority over a levy made by a junior judgment, should be reinstated to a priority over the junior judgment, in consequence of the judgment debtor executing an intermediate mortgage. But the court could not hold that the mortgage should be postponed to the junior judgment, for they had already decided that a prior

mortgage was a prior lien; nor could they hold that the elder judgment should be postponed to the mortgage, for they had already decided that as between judgments and mortgages the lien of a judgment without levy is paramount until the judgment is dormant; the court could not hold that the junior judgment should be postponed to the elder judgment, for the statute provided and the court had decided that a junior judgment, by levy within its year, obtained a priority over an elder judgment not levied within its year.

Perhaps it would have been more in accordance with former decisions and the statute, and certainly quite as just to have held, that the elder judgment should be first satisfied, and the balance, if any, paid upon the mortgage; but so

General Description of.

Where there is a lien of a judgment not sustained by levy within its year, but older than the lien of another judgment, the mortgagee cannot protect himself against the prior judgment lien, by the purchase of the junior judgment levied within its year.^p

SEC. III. GENERAL DESCRIPTION OF EXECUTIONS.

1. *Fieri Facias*.

The provisions of the statute in regard to this writ shows its general form and object: it commands the officer to whom it is directed, that of the goods and chattels of the debtor, he cause to be made the money specified in the writ; and for the want of goods and chattels, he cause the same to be made of the lands and tenements of the debtor.^q

Where it is certified in a judgment that one or more of the defendants is surety for the other, the writ must command the officer to cause the money specified to be made of the goods and chattels, lands and tenements of the principal debtor; but for want of such sufficient property of the principal debtor whereof to make the same, then that he cause the same to be made of the goods and chattels, lands and tenements of the surety or bail.^r

2. *Venditioni Exponas*.

This writ commands the officer to sell the goods and chattels, lands or tenements, levied upon under a previous execution and which remain unsold, to satisfy the money specified in the writ.^s Whenever a venditioni exponas issues, the clerk issuing such writ will, at the request of the person entitled to the benefit thereof, his agent or attorney, add thereto a command to the officer to whom such writ is directed, that if the property remaining in his hands, not sold, shall in his opinion be insufficient to satisfy the judgment or decree, he shall levy the same upon the lands and tenements, goods and chattels, or either, as the law shall permit, being the property of the judgment debtor, together with the property on hand, sufficient to satisfy the judgment or decree.^t

much of the money thus paid on the elder judgment as might be necessary to satisfy the junior judgment, or the whole of the money paid on the elder judgment, if the whole was necessary to satisfy the junior judgment, should be applied to the discharge of the junior judgment. This would have given the mortgagee the full benefit of any claim which he could have set up when

the mortgage was made, and would have also given the two judgments the full benefit of the statute and former decisions.

(p) 17 Ohio Rep. 578.

(q) Swan's Stat. 469, sec. 3.

(r) Swan's Stat. 482, sec. 26.

(s) Swan's Stat. 473, sec. 9.

(t) Id. 486, sec. 41.

Issuing of, other than a ca. sa.

3. *Capias ad Satisfaciendum, or Ca. sa.*

This writ commands the officer to take the body of the judgment debtor, to satisfy the money specified in the writ.

4. *Habere Facias.*

This writ issues upon a judgment in ejectment, commanding the officer to put the plaintiff in possession of the lands recovered, and to also make the damages and costs.

5. *Execution in Detinue.*

This writ contains a fieri facias clause for the damages and costs, and commands the officer to distrain the defendant by his lands and chattels, so that the defendant render the plaintiff the goods recovered by the judgment, or their value.

6. *Special Writ of Fieri Facias, for the Recovery of Costs.*

This writ is, in its general command, like a common fieri facias. The cases in which it may be issued has already been stated. Its form is prescribed by statute.

SEC. IV. ISSUING OF, AND PRECIPUE FOR EXECUTIONS OTHER THAN A CA. SA.

1. *Issuing.*

Executions, in general, issue as a matter of course upon a judgment not dormant.* A capias ad satisfaciendum, however, in most cases requires an order of the court or a judge to authorize its being issued.

Executions may be issued to any county in the State;† and two or more executions may be issued, at the same time, to different counties, upon the same judgment.‡

(u) Id. 647, sec. 4.

(w) Swan's Stat. 657, sec. 50.

(v) As to when a judgment is dormant, see ante p. 1003.

(x) 16 Ohio Rep. 27.

 Præcipe, and Forms of.

2. *Præcipe for Executions.*

Executions are issued by the clerk of the court, on præcipe filed by the judgment creditor or his attorney.

If a *capias ad satisfaciendum* is to be sued out, in a case requiring an order, the order accompanies the præcipe.

The præcipe for an execution is usually in the form following :

A. B. }
 v. } Judgt. ——— Term, A. D. 18—
 C. D. }

Issue *fi. fa.* [*or vendi., or vendi.* with *fi. fa.* clause, *as the case may be.*]
 To Clerk ——— Com. Pleas. S. S., Pl'ff's Att'y.

[*Date.*]

The clerk generally delivers the execution to the sheriff; but he is bound only to deliver it, on demand, to the judgment creditor or his attorney.

 SEC. V. FORMS OF EXECUTIONS.
1. *Fieri Facias on a Judgment or Decree for Money, in the Common Pleas.*

[SEAL.] The State of Ohio :

—— county, ss.

To the Sheriff of —— county — Greeting :

We command you that of the goods and chattels, and for want thereof, then of the lands and tenements of C. D., in your bailiwick, you cause to be made the sum of —— dollars, damages, [*or* —— dollars debt, and —— dollars damages, *as the case may be.*] and —— dollars costs of suit, which by the judgment [*or decree, as the case may be.*] of our Court of Common Pleas within and for the county of ——, at the —— term thereof, A. D. ——, A. B. recovered against the said C. D., with interest thereon from ——, [*date of the judgment or decree.*] until paid, together with the further sum of —— dollars, costs of increase on said judgment; and also the costs that may accrue; and have you the said moneys before our said Court of Common Pleas, at their next term, to render, &c. And have you then there this writ.

Witness, A. C., clerk of our said Court of Common Pleas, at ——, this —— day of ——, A. D. ——.

A. C., Clerk,
 By T. C., Deputy.

Forms of.

2. *The Like, on Mandate from the Supreme Court.*

[SEAL.] The State of Ohio :

— county, ss.

To the Sheriff of — county — Greeting :

We command you that of the goods and chattels, and for want thereof, then of the lands and tenements of C. D., in your bailiwick, you cause to be made the sum of — dollars, damages, [*or* — dollars debt, and — dollars damages, *as the case may be,*] and — dollars costs of suit, [*and* — dollars penalty,] which by the judgment [*or* decree, *as the case may be,*] of our Supreme Court within and for the county of —, at the term thereof, A. D. —, A. B. recovered against the said C. D., (and for having execution whereof a special mandate is sent down from our said Supreme Court to our Court of Common Pleas within and for the said county of —,) with interest thereon from the — day of —, A. D. —, [*date of the judgment or decree,*] until paid, together with the further sum of — dollars, costs of increase on said judgment ; and also the costs that may accrue ; and have you the said moneys before our said Court of Common Pleas, at their next term, to render, &c. And have you then there this writ.

Witness, A. C., clerk of our said Court of Common Pleas, at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

3. *Fieri Facias against Principal and Sureties.*

[SEAL.] The State of Ohio :

— county, ss.

To the Sheriff of — county — Greeting :

We command you that of the goods and chattels, and for want thereof, then of the lands and tenements of C. D., in your bailiwick ; and for want of goods and chattels, lands and tenements of the said C. D., then of the goods and chattels, and for want thereof, of the lands and tenements of E. F., in your bailiwick, you cause to be made the sum of — dollars damages, and — dollars costs of suit, which by the judgment of our Court of Common Pleas within and for the county of —, at the — term thereof, A. D. —, A. B. recovered against the said C. D. and E. F., and whereof the said C. D. is principal debtor, and the said E. F. his surety, as appears to us of record ; with interest thereon from the — day of —, A. D. —, [*date of the judgment,*] until paid, together with the further sum of — dollars, costs of increase on said judgment ; and also the costs that may accrue ; and have you

Forms of.

the said moneys before our said Court of Common Pleas, at their next term, to render, &c. And have you then there this writ.

Witness, A. C., clerk of our said Court of Common Pleas, at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

4. *Fieri Facias where a Defendant is made party by Scire Facias.*

[SEAL.] The State of Ohio:

— county, ss.

To the Sheriff of — county — Greeting:

Whereas, A. B., on the — day of —, A. D. —, in our Court of Common Pleas within and for the county of —, and by the judgment of the same court, recovered against C. D. — dollars damages, and — dollars costs of suit; and whereas afterwards, upon our certain writ of scire facias in that behalf, to wit, on the — day of —, A. D. —, by the judgment of the same court, it was considered that E. F. be made a party defendant to the judgment aforesaid, and that the said A. B. recover against the said E. F. his costs in that behalf expended, taxed to — dollars; whereof the said E. F. is convicted, as appears to us of record; therefore we command you that of the goods and chattels, and for want thereof, then of the lands and tenements of the said E. F., you cause to be made the damages and costs aforesaid, with lawful interest thereon until paid, together with the further sum of — dollars, costs of increase; and also the costs that may accrue; and have you the said moneys before our said Court of Common Pleas at their next term, to render, &c. And have you then there this writ.

Witness, A. C., clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

5. *Fieri Facias on suggestion of further Breaches after Judgment for Penalty.*

[SEAL.] The State of Ohio:

— county, ss.

To the Sheriff of — county — Greeting:

Whereas, A. B., on the — day of —, A. D. —, in our Court of Common Pleas within and for the county of —, and by the judgment of the same court, recovered against C. D. a certain penalty of — dollars debt, and

Forms of,

also — dollars damages, by reason of the detention thereof, with — dollars costs of suit; and whereas afterwards, upon our certain writ of scire facias in that behalf, by the judgment of the same court, it was considered, that execution be awarded against the said C. D., upon the judgment aforesaid, for the further sum of — dollars for other damages in said writ of scire facias assigned; and also that the said A. B. recover against the said C. D., — dollars, his costs in that behalf expended, whereof the said C. D. is convicted, as appears to us of record; therefore we command you that of the goods and chattels, and for want thereof, then of the lands and tenements of the said C. D. in your bailiwick, you cause to be made the damages and costs last aforesaid, with lawful interest thereon from —, [date of the judgment or decree,] until paid, together with the further sum of — dollars, costs of increase on said judgment, and also the costs that may accrue; and have you the said moneys before our said Court of Common Pleas, at their next term, to render, &c. And have you then there this writ.

Witness, A. C., clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk,
By C. T., Deputy.

6. *Scire Facias awarded from Common Pleas on Justice's Judgment.*

[SEAL.] The State of Ohio:

— county, ss.

To the sheriff of — county—Greeting:

Whereas, A. B., on, [&c.,] before S. S., esquire, one of our justices of the peace within and for the county of —, recovered a judgment against C. D. for — dollars damages, and — dollars costs of suit; and whereas afterwards, upon our certain writ of scire facias in that behalf, to wit, on the — day of —, A. D. —, in our Court of Common Pleas within and for the said county of —, and by the judgment of the same court, it was considered that execution be awarded from the said Court of Common Pleas, against the said C. D., upon the judgment aforesaid, for the damages and costs aforesaid; and also that the said A. B. recover against the said C. D. his costs in that behalf expended, taxed to — dollars; whereof the said C. D. is convicted, as to us appears of record; therefore we command you that of the goods and chattels, and for want thereof, then of the lands and tenements of the said C. D. in your bailiwick, you cause to be made the damages and costs aforesaid, with lawful interest thereon from —, [date of the judgment,] until paid, together with the further sum of — dollars, costs of increase on said judgment, and also the costs that may accrue; and have you the said moneys before our said Court of Common Pleas, at their next term, to render, &c. And have you then there this writ.

Forms of,

Witness, A. C., clerk of our said Court of Common Pleas at —, this
— day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

7. *Fieri Facias for Costs.*

[SEAL.] The State of Ohio:

— county, ss.

To the Sheriff of the county of —: Greeting.

Whereas, in a certain action of —, lately prosecuted in our Court of Common Pleas, [or Supreme Court, *as the case may be,*] within and for the county of —, wherein — was plaintiff, and — was defendant, the costs^a of said — were taxed at — dollars — cents; you are therefore commanded, that of the goods and chattels, or for the want of goods and chattels, of the lands and tenements of the said — in your bailiwick, you cause to be made the costs aforesaid, with interest thereon from the — day of —, A. D. —, [*the date of the judgment,*] until paid, and costs that may accrue. And if you shall levy and make said costs and interest, do you have the same before our Judges of our Court of Common Pleas, within and for said county of —, on the first day of the next term of said court, to render unto the persons entitled to the same. And have you then there this writ.

Witness, A. B., Clerk of our Court of Common Pleas, at — this — day of —, A. D. —.

A. B., Clerk.

8. *Fieri Facias after a Levy of Part.*

[SEAL.] The State of Ohio, — County, ss.

To the Sheriff of — County, Greeting:

Whereas by our writ we lately commanded you, that you should cause to be made of the goods and chattels, and for want thereof, then of the lands and tenements of C. D., in your bailiwick, the sum of, [*&c., as in the former fi. fa.*] whereof the said C. D. was convicted, as appeared to us of record; and that you should have that money, [*&c., as in the fi. fa.*] and that you should have then there that writ. And you at the day returned to us, in our said Court of Common Pleas, that by virtue of the said writ, you had caused to be made of the goods and chattels, lands and tenements of the said C. D. — dollars, parcel of the money in the said writ mentioned, which money you had ready at the day and place in the said writ contained, as by the said writ you were commanded; and that the said C. D. had not any other or more goods or chattels, lands or tenements in your bailiwick, whereof you could cause to be made

(a) If the writ is for costs on continuance, the said — on [continuance, or amendment, amendment, or under a special rule instead of *or otherwise as the case may be.*] Swan's Stat. the word "of" at (a) insert: "adjudged against 406.

Venditioni Expona-.

the residue of the money in the said writ mentioned as aforesaid, according to the exigency of that writ: Therefore we command you, that of the goods and chattels, and for want thereof, then of the lands and tenements of the said C. D., in your bailiwick, you cause to be made the residue of the said money in the said writ mentioned, together with the further sum of — dollars, costs of increase, and also the costs that may accrue; and have you those moneys before our said Court of Common Pleas, at their next term, to render, &c.; and have you then and there this writ.

Witness A. C., Clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

9. *Venditioni Exponas.*

[SEAL.] The State of Ohio, — County, ss.

To the Sheriff of — County, Greeting:

Whereas by our writ we lately commanded you, that of the goods and chattels, and for want thereof, then of the lands and tenements of C. D., in your bailiwick, you should cause to be made the sum of — dollars, *damages*, and — dollars, costs of suit, which, by the judgment [*or decree*] of our Court of Common Pleas, within and for the county of —, at the — term thereof, A. D. —, A. B. recovered against the said C. D., with interest thereon from —, until paid, together with the further sum of — dollars, costs of increase on said judgment, and also the costs that might accrue; and that you should have the said money before our said Court of Common Pleas, at the — term thereof, A. D. —, to render, &c., and that you should have then there that writ. And you at that day returned to us, in our said Court of Common Pleas, that by virtue of the said writ to you directed, you had, on the — day of —, A. D. —, levied the said writ upon certain goods and chattels of the said C. D., to wit, [*enumerating them*, or, "for want of goods and chattels, you had levied the said writ upon certain lands and tenements of the said C. D.," *describing them*;] which said goods and chattels [*or lands and tenements*] were then remaining in your hands unsold: Therefore we command you, that those goods and chattels [*or those lands and tenements*] you expose to sale;* and have the money arising from such sale before our said Court of Common Pleas on — next, to render, &c.; and have you then there this writ.

Witness A. C., Clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

Forms of Capias ad Satisfaciendum—Habere Facias.

10. *The like, with a Fieri Facias clause.*

*Proceed as in the last Precedent to the *, and then say:]* We also command you, that if, in your opinion, you cannot cause the said money to be made of the goods and chattels [*or* lands and tenements] so remaining in your hands unsold as aforesaid, that then you cause the same to be made of those goods and chattels, [*or* lands and tenements,] and of other goods and chattels, and for want thereof, then of the lands and tenements [*or* other lands and tenements] of the said C. D., in your bailiwick; and have you that money before our said Court of Common Pleas at their next term, to render, &c., and have you then and there this writ.

Witness A. C., Clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

11. *Capias ad Satisfaciendum.*

[SEAL.] The State of Ohio, — County, ss.

To the Sheriff of — County, Greeting:

We command you, that you take C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before our Court of Common Pleas, within and for the county of —, at their next term, to satisfy A. B. of — dollars, *damages*, and — dollars, costs of suit; which the said A. B., in our said Court of Common Pleas, on the — day of —, A. D. —, by the *judgment* [*or decree*] of the same court, recovered against the said C. D., whereof the said C. D. is convicted, as appears to us of record, together with the interest thereon, from —, [*date of the judgment or decree*,] until paid; and have you then there this writ.

Witness A. C., Clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

12. *Habere Facias, with Fieri Facias for Damages and Costs.*

[SEAL.] The State of Ohio, — County, ss.

To the Sheriff of — County, Greeting:

Whereas *John Doe*, on the — day of —, A. D. —, in our Court of Common Pleas, within and for the county of —, by the judgment of the same court, recovered against J. S., his term [*or, terms*] then and yet to come

Form of Habere Facias.

of and in two messuages, two hundred acres of arable land, &c., [*describing the premises as in the declaration or judgment,*] with the appurtenances, situate and being in your bailiwick, which E. F., on the — day of —, A. D. —, had demised to the said *John Doe*, to hold the same to the said *John Doe*, and his assigns, from the — day of — then last past, for and during and unto the full end and term of — years from thence next ensuing, and fully to be complete and ended;* by virtue of which said demise, the said *John Doe* entered into the said tenements, with the appurtenances, and was possessed thereof until the said J. S., afterwards, to wit, on the — day of —, A. D. —, with force and arms, &c., entered into the said tenements, with the appurtenances, which the said E. F. had demised to the said *John Doe*, in manner and for the term aforesaid, which was not then nor is yet expired, and ejected the said *John Doe* from his said farm, whereof the said J. S. is convicted, as appears to us of record: Therefore we command you, that without delay you cause the said *John Doe* to have the possession of his said term, yet to come, of and in the tenements aforesaid, with the appurtenances; and in what manner you shall have executed our command in this behalf, make appear to our said Court of Common Pleas at their next term. We also command you, that of the goods and chattels, and for the want thereof, then of the lands and tenements of the said J. S., in your bailiwick, you cause to be made the sum of — dollars, damages, and — dollars, costs of suit, which the said *John Doe*, on the day and year first aforesaid, and by the judgment of the same court, recovered against the said J. S., whereof the said J. S. is also convicted, as appears to us of record, with interest thereon from —, [*date of the judgment,*] and have you the said moneys before our said Court of Common Pleas, at their said next term, to render, &c.; and have you then there this writ.

Witness A. C., Clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

13. *The like, on a Double Demise.*

*Proceed as in the last Precedent to the *, and then say:*] and also his term then and yet to come of and in two other messuages, &c., [*describing the premises as before,*] which G. H., on, [&c.] had demised to the said *John Doe*, to hold the same to the said *John Doe*, and his assigns, from, [&c.] for and during and until the full end and term of — years from then next ensuing, and fully to be complete and ended; by virtue of which said several demises, the said *John Doe* entered into the said several tenements, with the appurtenances, and was possessed thereof, until the said J. S., afterwards, to wit, on, [&c.] with force and arms, entered into the said several tenements, with the appurtenances, which the said E. F. and G. H. had respectively demised to the said *John*

In Detinue.

Doe, in manner and for the several terms aforesaid, which were not then nor are yet expired, and ejected the said *John Doe* from his said several terms, whereof the said J. S. is convicted, as appears to us of record: Therefore we command you, that without delay you cause the said *John Doe* to have the possession of his said several terms yet to come of and in the several tenements, with the appurtenances; and in what manner you shall have executed our command in this behalf, make appear to our said Court of Common Pleas, at their next term. We also command you, that of the goods and chattels, and for the want thereof, then of the lands and tenements of the said J. S., in your bailiwick, you cause to be made the sum of — dollars, damages, and — dollars, costs of suit, which the said *John Doe*, on the day and year first aforesaid, and by the judgment of the same court, recovered against the said J. S., whereof the said J. S. is also convicted, as appears to us of record, with interest thereon from —, [date of the judgment,] and have you the said moneys before our said Court of Common Pleas, at their said next term, to render, &c.; and have you then there this writ.

Witness A. C., Clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

14. In Detinue.

[SEAL.] The State of Ohio, — County, ss.

To the Sheriff of — County, Greeting:

We command you, that of the goods and chattels, and for want thereof, then of the lands and tenements of C. D., in your bailiwick, you cause to be made the sum of — dollars, damages, and — dollars, costs of suit, which by the judgment of our Court of Common Pleas, within and for the county of —, at the — term thereof, A. D. —, A. B. recovered against the said C. D., with interest thereon from — until paid, together with the further sum of — dollars, costs of increase, and also the costs that may accrue; and have you the said moneys before our said Court of Common Pleas, at their next term, to render, &c. We also command you, that you distrain the said C. D., by all his lands and chattels in your bailiwick, so that neither he, the said C. D., nor any one by him, do lay hands on the same, until you shall have another command from us in that behalf, and that you answer to us for the issues of the same, so that the said C. D. render to the said A. B. the said goods and chattels, that is to say, [here enumerate the goods, &c.,] or the sum of —, for the value of the same, whereof the said C. D. is convicted, as appears to us of record. And in what manner you shall have executed this part of our

Indorsements on Executions.

command, make appear to the judges of our said Court of Common Pleas on —; and have you then there this writ.

Witness A. C., Clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk,
By T. C., Deputy.

SEC. VI. INDORSEMENTS ON EXECUTIONS BY THE CLERK.

The exact amount of the debt, damages, and costs, for which the judgment is entered, must be indorsed upon the execution.*

The costs of the party condemned, must also be indorsed; and are collected by the officer to whom the writ is directed in the same manner and at the same time as the judgment.*

Form of Indorsement on a Fieri Facias.

— Com. Pleas, No. —.

A. B. }
v.
C. D. }

Fi. Fa.

Returnable to —, Term, 18 —.

Debt, \$ —

Damages, —

Plaintiff's costs, —

Defendant's costs, —

Total, —

Interest from — 18 —,

S. S., Attorney for —.

ORIGINAL COSTS.

Clerk, \$ —

Sheriff, —

INCREASE COSTS.

Clerk, \$ —

Sheriff, —

Indorsements upon a Fi. Fa. on Mandate.

— Com. Pleas, No. —.

A. B. }
v.
C. D. }

Fi. Fa on Mandate.

Returnable to — Term, 18 —.

Debt, \$ —

Damages, —

Pl'ff's costs, in Com. Pl. —

ORIGINAL COSTS IN COMMON PLEAS.

Clerk, \$ —

Sheriff, —

(2) Swan's Stat. 469 § 3.

(a) Id. 405 § 50.

When to be returned — Recording Returns.

Deft's costs in Com. Pl.	_____	ORIGINAL COSTS IN SUPREME COURT.	
Total,	_____	Clerk,	\$ _____
Interest from _____, 18—,	_____	Sheriff,	_____
Statutory damages,	_____	Total,	_____
Pl'f's costs in Sup. Ct.,	_____	INCREASE COSTS.	
Def'ts " " "	_____	Clerk,	\$ _____
Total,	_____	Sheriff,	_____
Interest from _____, 18—,			
S. S., Attorney for _____.			

When a writ of Ca. Sa. is required to be issued to another county, the clerk may refuse to issue it, until the plaintiff, his agent or attorney, deposits funds sufficient to enable the clerk to pay the fees of the officer serving the writ; and in issuing the writ, the clerk indorses, "funds are deposited to pay the sheriff on this writ."³

SEC. VII. WHEN EXECUTIONS MUST BE RETURNED, AND THE RECORDING OF THE RETURNS OF OFFICERS.

In general, executions issued by the Court of Common Pleas must be returned on or before the second day of the term to which the same are returnable.^a Executions issued by the courts of Hamilton county within twenty days prior to the commencement of any term, may be returned on or before the third Monday of the term.^c

When writs of execution or orders of sale in chancery are in the hands of an officer at the time of the passage of any law prescribing the times of holding courts, and there is not sufficient time to return the writs by the second day of the term of the court prescribed in such law, the officer may return the writs at any time during the setting of the court.^d

By act of February 25, 1848,^e the clerks of the Courts of Common Pleas are required to record at length in the execution docket, the return of officers, of all levies made on real estate under executions at law, and the return of all subsequent proceedings had by officers in pursuance of such levies. The record so kept becomes a part of the records of the Court. An execution, however, by being returned by the officer into the clerk's office becomes a part of the files and records of the court; but if not returned, the original must be produced as an instrument of evidence, and it cannot be proved by an examined or certified copy.^f

(b) Swan's Stat. 481 § 24.

(c) Id. Ib., 225 § 13; 46 vol. Stat. 18 § 7.

(d) 46 vol. Stat. 24 § 3.

(e) 44 vol. Stat. 95.

(f) 4 Blackf. 487.

(g) Swan's Stat. 402.

CHAPTER XXXI.

PROCEEDINGS UNDER A FIERI FACIAS.

SECTION I. AS TO PERSONAL PROPERTY.

1. What personal property is exempt from execution.
2. What description of personal property may be taken on execution.
3. The duty of the officer to search for goods.
4. Liability for levy on wrong goods.
5. Mode of making a levy, and removal of goods.
6. Effect of the sheriff paying the execution himself.
7. The general effect of the levy upon goods — responsibility of the officer for their safe keeping, &c.
8. The effect of staying the execution, &c., after the levy.
9. Trial of right of property taken by the sheriff.
10. The bond for the redelivery of property, and its effect.
11. Expenses of keeping live stock.
12. Advertisement of the sale of goods.
13. How the sale of goods to be conducted.

II. AS TO REAL ESTATE.

1. What kind of an estate in lands, is subject to levy and sale upon a judgment.
2. When and how levy made upon real estate.
3. Appraisement of real estate.
4. Setting aside appraisement.
5. The advertisement and sale of real estate.
6. Confirmation of sale on execution.
7. Deed of the sheriff.
8. The rights of purchasers of lands from the judgment debtor as against the judgment creditor and purchasers under the judgment.

III. FORMS OF RETURNS TO FIERI FACIAS AND VENDITIONI EXPOSITAS.

IV. AMENDMENT OF RETURN.

V. SETTING ASIDE LEVY.

VI. DISTRIBUTION OF MONEY MADE.

Personal Property exempt from Execution.

SEC. I. AS TO PERSONAL PROPERTY.

1. *What Personal Property is Exempt from Execution.*

By act of March 9, 1840,^a it is provided, that each person who has a family, shall hold the following property, exempt from execution or sale for any debt, damages, fine or amercement, to wit:

First: The wearing apparel of such family, the beds, bedsteads and bedding necessary for the use of such family; one stove and pipe, used either for cooking or for warming the dwelling house; an amount of fuel sufficient for the period of sixty days, actually provided and designed for the use of such family.

Secondly: One cow, or, if the debtor own no cow, household furniture, to be selected by the debtor, not exceeding fifteen dollars in value; two swine, or the pork therefrom, or, if the debtor own no swine, household or kitchen furniture, to be selected by the debtor, not exceeding six dollars in value; six sheep, the wool shorn from them, and the cloth or other articles manufactured therefrom, or, in lieu of such sheep, household or kitchen furniture, to be selected by the debtor, not exceeding ten dollars in value; and sufficient food for such animals, when owned by the debtor, for the period of sixty days.

Thirdly: The bibles, hymn books, psalm books, testaments and school books used in the family, and all family pictures.

Fourthly: Any amount of provisions actually prepared and designed for the sustenance of such family, not exceeding forty dollars in value, to be selected by the debtor; and such other articles of household and kitchen furniture, or either, necessary for the debtor and his family, and to be selected by the debtor, not exceeding thirty dollars in value.

Fifthly: The tools and implements of the debtor, necessary for carrying on his trade or business, whether mechanical or agricultural, to be selected by him, not exceeding fifty dollars in value.

A person engaged in the business of agriculture, may select as "tools and implements necessary to carry on his trade or business," one work horse or mare, or one yoke of work oxen, with the necessary gearing for the same.^b If the debtor be actually engaged at the time in the practice of medicine and surgery, he may select as such necessary "tools and implements," one horse or mare, and one saddle and bridle, and also medicines, instruments and books, pertaining to his profession, not exceeding in value the sum of fifty dollars.^c

A person engaged in the business of draying for a livelihood, holds one horse, harness and dray, exempt from execution.^c

It is further provided, that the amount of beds, bedsteads and bedding, necessary for the use of such family; the amount of fuel sufficient for the period of sixty days, actually provided and designed for the use of such family;

(a) Stat. 487.

(b) 43 vol. Stat. 28.

(c) 46 vol. Stat. 57.

Personal Property exempt from Execution.

the amount of food for the use of the animals exempted from execution, for the period of sixty days, shall be determined by two disinterested householders of the county, to be selected by the officer holding the execution. And the value of the provisions, household and kitchen furniture, and the tools and implements of the debtor, necessary for carrying on his trade or business, exempted from execution, shall be estimated and appraised by said householders.

On an execution against an executor or administrator, as such, his own property cannot be taken. The officer can only seize the property of the decedent, whom the administrator or executor represents. So, on the other hand, upon an execution against a person in his individual capacity, the property which he may have in his possession as executor or administrator, cannot be taken.

The seal, registers and official documents of notaries public are exempt from execution.⁴

The goods and chattels of a public ambassador, or minister of a foreign State, and of his domestic servants, are not liable to be taken on execution.⁵

Where execution is issued against the wife on a judgment obtained against her before coverture, the goods that she had before marriage cannot be taken, for they vest in the husband by the marriage.⁶

By statute, all household goods and articles of furniture which a wife shall have brought with her at marriage, or which shall have come to her by bequest, gift, or which shall have been, after marriage, purchased with her separate money or other property, shall be exempt from liability for the debts of the husband during the life of the wife, and during the life of any heir of her body.⁷

The arms and equipments of the officers and soldiers of the militia are free from levy by any execution issued in any civil action.⁸

Most of the above mentioned property exempted from execution, becomes so by the act and selection of the debtor; but some of it is specifically exempted, as the seal, &c. of a notary, &c. The officer becomes a trespasser by levying on the property specifically exempted. The debtor need not be notified of a levy, unless where it is intended to be made upon property of that species from which the statute gives a right of selection. If the debtor, after being apprised of the intended levy, selects from such property, and the proper appraisal is held, the property selected must not be seized. If he neglects or refuses to select, the appraisers must be called to do their duty as far as they can, and the debtor, it would seem, cannot afterwards make his selection.¹

When the judgment debtor has obtained goods by fraud and with the design of not paying for them, or by fraudulent pretences, the officer cannot interfere with the vendor's right to reclaim them.¹

(d) Stat. 601, § 3.

(e) Laws U. S. vol. 2, p. 97, 98.

(f) 3 M. & S. 558.

(g) 44 vol. Stat. 75; 45 vol. Stat. 23.

(h) 42 vol. Stat. 56.

(i) Gwynne on Sheriffs. 215; see 1 Gilman Rep.

(j) See the cases &c. cited ante p. 20, note. As to affirmance by the vendor, of such sale, so as to make it valid, see 6 Met. 68; 12 Pick. 312; 16 Conn. 81; 13 Wend. 570; 1 Hill, 311. See, also, Gwynne on Sheriffs. 232, 233.

Personal Property which may be levied on.

Goods bona fide vested in trustees for the benefit of the wife, before marriage, cannot be taken upon an execution against the husband; nor, indeed, can goods bona fide vested in a trustee be seized on an execution against the trustee.

If there be a judgment against a separate partner, for his private debt, the undivided interest of the partner in the copartnership, may be sold. It is the interest of the partner in the concern, and not the effects themselves, which the officer, in such case, sells;^m and the purchaser only purchases the undivided interest which the partner owns, after the accounts of the firm are settled; or, in other words, the purchaser takes subject to the partnership debts.ⁿ The officer, therefore, does not seize the partnership property, itself, on an execution against a separate partner, (as he would do if the execution were against the firm,) for the other partner has a right to retain the property for the payment of the partnership debts.^o In such case, the court will enjoin the sale at the instance of such other partner.^p

So, the separate effects of any or either of the individual partners, may be seized upon and sold.^k To this, however, there is an exception, when the judgment has been against the defendants by their firm name only:^l in such case, the individual property of the partners must be reached by bill in chancery.

When the execution is against two or more, the officer may levy for the whole, or any part, upon the property of all or either of the defendants, and is not bound to apportion the levy.

2. *What description of Personal Property may be taken on Execution.*

The officer is authorized to seize and sell, as goods and chattels, all personal property of a tangible nature, except what is exempt by law. Growing corn, and other crops raised annually by labor, are chattels, and as such may be levied on before or after they are gathered.^q

An officer has no right to cut down or gather a crop before it is ripe;^r but when a levy is made while the crop is unripe, he may then sell it, or wait until it shall be ripe.^s The purchaser will have a right to take care of, and to gather it.^t

Apples upon the trees, and all such things as grow annually without labor, are a part of the freehold, and cannot be taken by an execution until severed from the freehold.

(k) 1 Bos. & Pul. 547.

(l) 44 vol. Stat. 66.

(m) 2 Johns. Chy. Rep. 548, per Kent, Chan.; 8 Pe'. U. S. Rep. 271.

(n) 16 Johns. Rep. 102, and 106, notes, where the authorities are collected

(o) Id. Ib.; 2 Wend. 5:3.

(p) 16 Ohio Rep. 142.

(q) 17 Johns. Rep. 128; 2 Id. 418; 9 Id. 108. Stat. 520, § 84. 9 Cow. Rep. 39.

(r) 7 Mass. Rep. 34.

(s) 2 Johns. Rep. 418.

(t) 7 Mass. Rep. 34.

Personal Property which may be levied on.

The interest or estate of a tenant in lands held by an unexpired lease, is also a chattel that may be sold.^a If a lease be renewable forever, it cannot be levied upon or sold as personalty.^b If there are fixtures upon land occupied by a tenant, which he has a right to remove, at or before the expiration of the lease, the officer may in general levy upon them as chattels of the tenant, to satisfy an execution against him. It is, however, a general rule, that where a tenant makes a permanent improvement upon rented land, such as a dwelling house, or out buildings, he cannot remove them, either before, or at the expiration of the lease, unless allowed to do so by the terms of the lease.^c There are exceptions to this rule. If a building, shop, or machine, be put up by a tenant, for the purpose of carrying on his trade, it is in general considered as his chattel property, which he may remove; as, where a tenant erects a house to carry on the business therein of making varnish;^d or vats are erected by a soap boiler.^e

It has been decided, that a cider mill and press; steam engines; sugar kettles set in a furnace; thrashing machines fixed to the land by means of a building; kilns and sheds for making brick; and carding machines, erected by the tenant, at his own expense and for his own use, may be removed by him at or before the expiration of the lease, and consequently may be levied upon as his chattels.^f

If the agreement between the landlord and tenant be, that the tenant may remove his improvements, they are the chattel property of the tenant, and may, together with the leasehold estate, be levied upon and sold.

In general, however, fences, buildings, cider mills, vats, steam engines, and other machinery affixed to a building, &c., and other fixtures, are a part of the land, and cannot be sold as chattels upon an execution against the owner of the land.^g

Money of the judgment debtor, in his house or possession, may be levied upon, and must be credited (without sale) on the execution.^h So, bank bills may be levied upon as money,ⁱ and applied without sale to the discharge of the execution. Where an officer has an execution against a judgment debtor, and has at the same time money of the judgment debtor in his hands, collected on an execution, it seems that the officer cannot levy upon such money until it is in the hands of the debtor.^j

Promissory notes, bonds and other contracts, private papers, account books, and also bank shares, and shares in a public library, or other corporation, are not, in general, liable to be seized and sold upon execution.^k

(u) 3 Ohio Rep. 449, 465; 7 Eng. C. L. Rep. 83. See 19 Johns. Rep. 73.

(v) Stat. 289.

(w) 6 Eng. C. L. Rep. 19.

(x) 2 East's Rep. 88.

(y) 1 Salk. 368; 6 Cow. 665; 7 Cow. 319.

(z) Gwynne on Sheriffs, 247-249.

(a) 6 Cow. Rep. 665; 3 East's Rep. 36; 7 Black, 469.

(b) 1 Cranch 117; 1 Pet. Cond. Rep. 261.

(c) 12 Johns. Rep. 220, 395. The case of Goodenow vs. Duffield (Wright's Rep. 455) does not conflict with the rule in the text.

(d) 1 Ohio Rep. 275.

(e) 12 Mass. Rep. 506; 7 Id. 43; 15 Id. 584; 9 Johns. Rep. 96; Wright's Rep. 455.

 Personal Property which may be levied on.

Where property is honestly assigned, mortgaged or pledged by a judgment debtor, before levy, as security for a debt, it cannot be levied upon and sold by execution against such judgment debtor;^f at least, not until the debt for which the assignment, pledge, or mortgage was given, has been tendered or paid.^g—But if the defendant has hired the use of goods or chattels for a certain period, the officer may seize and sell the goods, and the purchaser will acquire the right to use them during the term they were hired by the defendant.^h

The statuteⁱ provides that every mortgage, or conveyance intended to operate as a mortgage of goods and chattels, made after the first of April, 1846, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is forthwith deposited, &c., as follows:

The instrument, or a true copy, must be filed with the clerk of the township where the mortgagor, if a resident of this State, resides, at the time of the execution thereof; and if not a resident, then with the clerk of the township where the property mortgaged may be at the time of the execution of the instrument. In all townships, however, in which the office of recorder of the county is kept, the instrument must be deposited with the recorder, instead of the township clerk. The township clerk and recorder do not record these instruments, but file them, and indorse upon each the time of receiving it.—Every mortgage so filed is void as against the creditors of the mortgagor, and subsequent purchasers and mortgagees in good faith, after the expiration of one year from the filing the same, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of the mortgage, shall be again filed with the township clerk, (or recorder) where the mortgagor shall then reside, if in this State; and if his residence shall not be in this State, then in the office of the clerk of the township, (or recorder,) in which such property may then be.

In general, goods and chattels levied upon, cannot be seized upon another execution, in the hands of a different officer;^j but if fraudulently held under a prior execution, the sheriff is bound to levy upon them.^k

When a railroad or turnpike company own an easement or right of way only over land, the easement cannot, it seems, be sold on execution against the company,^l nor its franchise, except by express provision of law.

The mode of proceeding against turnpike companies^m and townships,ⁿ is pointed out by statute.

(f) 1 Pick. Rep. 399; 4 Cow. 461, 467.

(g) Story on Bailm. 238, 239.

(h) 7 T. R. 11; 8 Co. 191. 2 Cow. Rep. 543.

(i) 44 vol. Stat. 61. As to duty of Recorder in Cuyahoga county, see 46 vol. Stat. 108.

(j) 5 Mass. Rep. 271.

(k) 8 B. & C. 132; 5 Id. 680.

(l) 13 S. & R. 219; 4 Mass. 596; see 10 Ohio Rep. 476; 5 Ired. 307.

(m) See Swan's Stat. 982; 47 vol. Stat. 41.

(n) Id. 956.

3. *The Duty of the Officer to search for Goods.*

The law requires reasonable diligence on the part of the officer to make the money, as commanded by the process.

This reasonable diligence must depend upon the circumstances of each case, so that no very definite rule can be given. The situation of the property of the defendant, and its accessibility, may be such that the officer would be guilty of gross negligence in making a return of no goods. The mere fact, however, that the defendant had property liable to levy, will not, in general, be sufficient to charge the officer with delinquency. Other facts and circumstances must be shown, such as the kind, situation and quantity of property, the knowledge which the officer had, or might have had, of the property and its ownership, and which would demand action on his part; and if these facts and circumstances are such as to show expressly or presumptively, that he must have had knowledge that by proper diligence he might secure the debt, he is answerable for failing to exert himself.^a If he does exert himself, or if he uses reasonable diligence, he is not liable, although the defendant in fact had property.^b

If the officer knows the defendant, and where he resides, he should go to his house in pursuit of property; and if he knows the defendant, but does not know where he resides, he should ascertain his place of residence, if it can be done by reasonable inquiry; for, if a defendant, in such case, have property which the officer could levy upon by going to the residence, the officer has omitted to do his duty.^c

If it be shown that the defendant was in possession of property not exempt from execution, and that the officer knew it, and failed to levy upon it, he will in general be held responsible; and the burden falls upon him to show that the property was not owned by the defendant or was otherwise not subject to execution. Hence, in general, the officer must choose between making himself liable to the plaintiff for not levying, and making himself liable to the defendant or some third person for making the levy.^d

The rule of damages for omission to make a levy, is, in general, the actual injury sustained by the plaintiff.^e

4. *Liability for Levy on wrong Goods.*

Trespass, trover or replevin, lies against an officer who levies on the goods of A. when the execution is against B.;^f and if the plaintiff or a third person be present and direct the levy, trover will also lie against him.^g

(a) 1 J. J. Marsh. 550. (b) 1 Conn. 387.

(c) 1 J. J. Marsh. 550.

(d) Id. lb.; 5 Wend. 309; 10 Shep. 302; 2 Blackf. 65.

(e) 16 Conn. 536, 555, 558; Stra. 650, 429, 436.

(f) 8 Pick. Rep. 133; 2 Blackf. 94; 2 A. K. Marsh. 268; 15 East. 507.

(g) 7 J. J. Marsh. 646; 1 Bos. & Puff. 369.

If the plaintiff did not direct or assent to the sale he will not be liable. 1 Denio, 501.

What is a valid levy.

5. *Mode of making a Levy, and removal of Goods.*

The property being within view of the officer, he must manifest his intention to make a levy, either by declaring his intent, or doing some act equivalent to a declaration of his intent, such as making an inventory or making a memorandum on the execution, or the like.^a When the inventory is of goods in boxes, only one of which is opened, but all of which are in view of the officer, the levy is complete.¹

To constitute a good levy, the officer must also have the property within his control, as far as the nature of the property will permit. Where a sheriff seized a few articles outside of a store, or warehouse, and proclaimed a levy on the goods locked up within the store, and not within view, the court held this not to be a levy, but that the officer ought to have broken open the store, and actually seized the goods.¹ Although an officer may levy upon part of the goods in a house in the name of the whole, and such levy will be good for all,² yet, if after he has made the levy, he abandon the property to the possession of the owner, without taking any steps to remove it, and without taking bond under the statute for its delivery, it will in general be considered as an abandonment of the levy itself, and a subsequent execution, afterwards levied upon the same goods, would gain a preference.¹ Where the officer went into the house of the defendant, and stated that he came to levy on his goods, and, laying his hands on a table and saying, "I take this table," locked up his execution in the table drawer, and took the key and went away without leaving any person in possession, or taking any further steps to obtain a control over the property, it was holden by the court that there was no claim on any of the goods by such a levy, and that the officer had neither actual nor constructive possession after he left them.³ It must not be supposed from what is here said, that the officer will lose his levy if he leave the goods for the purpose of procuring the means of removing them. On the contrary, an officer may always have a reasonable time to remove the goods; and leaving the property in the possession of the debtor for a reasonable time, is not per se fraudulent.⁴ What is a reasonable time, must depend upon the nature of the goods, and other circumstances. So, there may be cases where the property is of so little value in proportion to its weight and the expense and time required to remove it, that the levy would be good although the officer permitted the property to remain on the premises of the defendant until the sale.

If all the possession be taken of which the thing levied upon is capable, it will be sufficient; thus, standing grain may be levied upon, and left in the

(h) 23 Wend. 490.

(i) 23 Wend. 467.

(j) 16 Johns. Rep. 287.

(k) 1 Ld. Raym. 724.

(l) Dal. 213, 358, 169; 4 Yates, 194, and cases there cited. Contra, 2 Cow. Rep. 272.

(m) 1 M. & S. 712.

(n) 11 Wend. 552.

field. Property, however, of a portable kind, should be taken possession of by the officer, unless the defendant will give security for its re-delivery.

The object, however, of taking actual possession of the property, is not for the purpose of rendering the levy perfect, but to protect the officer from the acts of the defendant and others, and to prevent the property from being afterwards taken on a subsequent execution; for, after the levy is made, the officer is liable to the plaintiff for the application of the property to the satisfaction of his debt. The sheriff may intrust the property for safe-keeping, even without bond, to the defendant or a third person; but he is responsible for, and insures their good conduct, and is considered as himself holding the goods; and, in such case, may retake them wherever he can find them, provided he commits no breach of the peace.*

If the property is left with the defendant an unreasonable time, and he is permitted to exercise acts of ownership over it, and use it as his own, it will be evidence of a fraudulent use of the execution, so as to postpone the levy to bona fide purchasers, or junior executions.⁹

The receipt of a second execution after the levy, is a constructive levy on the same goods, without a new levy, if the sheriff choose so to treat it.⁹

6. *Effect of Sheriff paying the amount of the Execution himself.*

The officer cannot, with his own money, pay the plaintiff, and afterwards levy the execution on the property of the defendant, even though it were agreed between him and the defendant that he should retain the execution and use it for his own indemnity; for, by the payment, the execution is spent.—Such agreements are illegal, as they tend to oppression and abuse. The officer, therefore, cannot take a bond or other security from the defendant, and detain the execution in his hands, and use it afterwards to enforce the payment of the money advanced by him.¹ So, if the officer levies on goods, and pays the plaintiff with his own proper money, he cannot keep the goods for his own security; the levy is discharged, and gone.² He may have his action for the money.¹

7. *The general effect of the Levy upon Goods—Responsibility of Officer for their safe keeping, &c.*

The moment the officer has the property under his view and control, by virtue of the execution, he has a right to take possession, and in general be-

(o) 6 Ohio Rep. 450; 14 Ohio Rep. 545.

(p) 11 Wend. 552; 7 Dana, 222.

(q) 19 Johns. 116; 1 Hill's Rep. 559.

(j) 7 Johns. Rep. 426; 15 Id. 443; 12 Id. 207.

(k) Id. Ib.

(l) 3 Johns. Rep. 434; 14 Id. 87.

Effect of Staying the Execution.

comes liable to the plaintiff and defendant for its application to the payment of the judgment.

The defendant cannot, in general, after the levy is made, do any act (as by assignment to the commissioner of insolvents,^m or otherwise,) to change the effect of, or destroy the levy; nor can he maintain an action for any wrong or injury done to the goods, by any person who takes them or injures them while in the possession of the officer. His sole remedy is against the officer.ⁿ

When goods of the defendant sufficient to satisfy the judgment are seized on an execution, and the officer wastes them, or neglects to sell them, or misapplies the money arising from the sale, or fails to return the writ, the plaintiff must look to the officer for payment of the judgment; the debtor is discharged by an adequate seizure, and the plaintiff cannot have another execution, or levy.^o So, when goods of the defendant, not sufficient to satisfy the judgment, are seized, the plaintiff must look to the officer for their value or avails, and cannot, before the goods are sold or the levy disposed of, have an execution against the body of the defendant.^p

The officer being responsible, as well to the plaintiff as the defendant, may sue any person who wrongfully takes the goods from his possession, or otherwise unlawfully intermeddles with or injures them.^q In such suit, the indorsement of the levy upon the execution will be sufficient evidence (until disproved) of the fact of the levy.^r

The officer is not responsible for their loss by fire, theft, embezzlement, natural decay, or the like. But he must exercise good faith and diligence; and is responsible for his own gross negligence and fraud, and the gross negligence or fraud of the person with whom he may leave the goods. The common care which men of common prudence ordinarily exercise in the keeping and preserving property of like kind, he is probably bound to exercise, and no more;^s and if, notwithstanding such care, the property deteriorate or decay, &c., the loss, in general, falls on the defendant.

8. *The effect of Staying the Execution, &c., after the Levy.*

A levy upon personal property cannot be permitted to remain, as a mere security for the judgment.

In general, therefore, if, after the levy, the plaintiff from humanity or other motive, directs the officer to proceed no further with the execution until further ordered, or until some specific day, and the property, either with or without a delivery bond, is left with the defendant to use and control as his own, another

(m) Wright's Rep. 259.

(n) 2 Mass. Rep. 514; Story on Bailm. 96.

(o) 4 Mass. Rep. 403, per PARSONS, C. J.; 12

Johns. Rep. 207; 7 Id. 428; 4 Cow. Rep. 417;

7 Id. 21, 310; 3 Ohio Rep. 225; 5 Id. 173;

Salk. 323; 4 Johns. Chy. Rep. 255

(p) 6 Taunt. Rep. 369.

(q) 2 Mass. Rep. 514; 9 Id. 104; 1 Pick. Rep.

389.

(r) 7 Cow. Rep. 313.

(s) Story on Bailm. 130.

Trial of Right of Property.

execution, levied while such stay exists, will obtain a preference. The force and effect of the levy may be restored by a countermand of such direction, but not after a levy has been made upon the goods by a subsequent execution.¹

So, when goods remain in the possession of an officer under a levy for a long time, by the consent of the plaintiff, a subsequent execution issued on another judgment may be levied upon them, and will gain a preference.² There may, however, be circumstances arising from the nature and situation of the property itself, or other cause, which will justify the plaintiff in delaying a sale. Thus, if the property be in such a condition that a great sacrifice would be made upon it by an immediate sale and delivery, the plaintiff will not lose his lien by a delay until such time that the sacrifice will not be incurred by a sale. Where hides undergoing the process of tanning, and in vats, were levied upon in the fall of the year, and could not be sold until spring without a great sacrifice, and the plaintiff therefore directed the officer to delay a sale until spring, it was held by the court that this did not render the execution dormant or fraudulent, so as to give subsequent executions a preference.³

9. *Trial of Right of Property taken by the Sheriff.*

When property levied upon is claimed by any other person than the judgment debtor, the sheriff must forthwith give notice in writing, to some justice of the peace of the county; in which notice must be set forth the names of the plaintiff and defendant, together with the name of the claimant; and, at the same time, the sheriff must furnish the justice with a schedule of the property claimed. The justice, immediately upon the receipt of the notice and schedule, should copy the same upon his docket, and issue a writ of venire facias, or summons, directed to the sheriff, or any constable of the county, commanding him to summon five disinterested persons, having the qualifications of electors, who must be named in the venire, to appear before him, at the time and place therein mentioned, (which time must not be more than three days after the date of the writ,) to try and determine the right of the claimant to the property in controversy.⁴

The claimant must give two days' notice, in writing, to the plaintiff or other party for whose benefit such execution was issued and levied, his agent or attorney, if within the county, of the time and place of such trial; and must prove, on the trial, to the satisfaction of the justice, that such notice was given, or that the same could not be given by reason of the absence of the party, his agent or attorney, as above mentioned.⁵ If the claimant do not satisfy the jus-

(t) 3 Wash. C. C. Rep. 60; 11 Johns. Rep. 110; 1 Wile. Rep. 44; 4 Dall. Rep. (2d ed.) 213, 238, 159, 169, n. a; Cowp. 432; 2 Wend. Rep. 419; Salk. 720; 3 Raw. Rep. 341; 8 Serg. & Raw. 505; 7 Johns. Rep. 274; 7 Cow. Rep. 310; 15 Eng. Com. Law Rep. 165.

(u) 15 Eng. Com. Law Rep. 165.

(v) 7 Cow. Rep. 560.

(w) For the proceedings in such case, see Swan's Trea. (4th ed.) 473.

(x) Swan's Stat. 471, sec. 6.

(y) Id. ib.

Sale notwithstanding Trial—Notice of Claim.

tice in this respect, judgment, as in case of nonsuit, should be rendered against him. The justice, for good cause shown, would be authorized to adjourn the trial for a reasonable time. The adjournment ought not, however, to be granted for such a time, as would prevent the sheriff from afterwards advertising and selling the property on the execution. If, by reason of challenge or any other cause, there is not a full jury, the justice may order the constable to fill the panel with talesmen.

The jury must be sworn or affirmed by the justice.

If the jury find the right to all *or any part* of the goods to be in the claimant, they find the value of the goods, and judgment is entered in his favor for costs, and execution awarded thereon as in other cases;^a but if the right to the goods, and *every part thereof*, shall not be vested in the claimant, according to the finding of the jury, then judgment must be rendered against the claimant for costs.

No appeal is allowed from the judgment of the justice.

The proceedings under the statute, if the jury find against the claimant, protect the officer from any action by the claimant; but the claimant may, notwithstanding, sue a purchaser at the sheriff's sale, or the plaintiff, or other person than the sheriff, who intermeddles with the property.^a

If a verdict is found in favor of the claimant, and the plaintiff in execution shall, at any time within three days after the trial, tender to the sheriff, or other officer having the property in custody, a bond, with good and sufficient sureties, payable to such claimant, in double the value of such property, conditioned for the payment of any final judgment which such claimant may recover against the plaintiff in execution, in any court having jurisdiction thereof, for damages sustained by reason of the detention or sale of such property; in such case, such sheriff, or other officer, must deliver the bond to the claimant, and proceed to sell such property as if no such trial of the right of property had taken place, and will not be liable to the claimant therefor.^b

The notice to the justice may be as follows:

Form of Notice by the Sheriff to the Justice.

To G. H., Justice of the Peace of ——— Township, ——— County, Ohio:

You are hereby notified, that E. F. claims the following described goods and chattels, levied upon by me, on, [&c.] as the property of C. D., by virtue of a fieri facias execution issued from the Court of Common Pleas of said county, at the suit of A. B., against C. D.; returnable to the ——— term, A. D. 18 ——— thereof, to wit: [*Here describe each article levied on and claimed.*

[*Date.*]

S. S., Sheriff of ——— County.

(z) Swan's Stat. 471.

(a) 8 Ohio Rep. 366.

(b) 45 vol. Stat. 55.

Bond of Indemnity to Sheriff—Redelivery Bond.

The bond of indemnity may be in the form following :

Form of Bond of Indemnity to the Sheriff.

Know all men by these presents, that we, A. B., I. J. and K. L., are held and firmly bound to E. F., [*the name of the claimant,*] in the sum of [*double the value of the property as found by the jury,*] dollars; for the payment of which, we jointly and severally bind ourselves. Sealed with our seals, this — day of —, A. D. —.

The condition of the above obligation is such, that whereas, the said S. S., sheriff of the county of —, by virtue of an execution, issued at the suit of A. B. against C. D. by the Court of Common Pleas of said County, hath seized, as the property of said C. D., divers goods and chattels which are claimed by E. F., and on the — day of —, A. D. —, upon the trial of the right of property therein, before G. H., a justice of the peace of said county, the said sheriff was ordered to restore said property to said claimant, and the said A. B. hath, notwithstanding, requested said sheriff to proceed and sell said property under said execution :

Now, if said A. B. shall pay and satisfy any final judgment which the said E. F. may recover against the said A. B. in any court having jurisdiction in the premises, for damages sustained by reason of the detention or sale of said property, then this obligation to be void, otherwise in full force.

A. B., [L. s.]

I. J., [L. s.]

K. L. [L. s.]

10. *The Bond for the redelivery of Property, and its effect.*

When an officer levies on goods and chattels which remain upon his hands unsold for want of bidders, for want of time to advertise and sell, or any other reasonable cause, he may, for his own security, take of the defendant a bond, with security in such sum as he may deem sufficient.^a The bond must be conditioned that the property shall be delivered to the officer taking the bond, or other officer holding an execution for the sale of the same, at the time and place appointed by such officer; which appointment is to be made either by a notice given in writing to the defendant in execution, or by advertisement, published in a newspaper printed in the county, naming therein the day and place of sale.^b

If the defendant afterwards fails to deliver the property, at the time and place mentioned in the notice given to him, or to pay the officer holding the execution the full value of the property, or the amount of the debt and costs, the condition of the bond is broken.^c

(a) Swan's Stat. 472.

(b) Id. Ib.

(c) Id. Ib.

Form of Redelivery Bond.

The condition of the bond can only be saved by a redelivery of the property, or an offer to redeliver it, at the time stipulated.^d After the condition is broken the officer may seize the property, wherever he can find it, if he can do so without a breach of the peace, or may maintain trover or replevin.^e

If the property is not delivered on notice in writing being given, the sureties in the bond are liable, although no execution issues after the bond is given.^f

The bond is for the security of the officer, and he may take it or not, at his option. If the property is not redelivered, he is liable to the plaintiff in like manner and to the like extent, as if he had taken no bond; and must look for his indemnity to the bond. He is, therefore, liable to be amerced, as having neglected to serve the execution, upon his making return of the levy, &c., and that he demanded the property at the time and place of sale, and it was not delivered.^g

It seems after the bond is executed and the property delivered to the defendant, the officer has a special property in the goods and chattels; at least, until the condition of the bond is broken.^h

The bond for the redelivery of property may be in the form following:

Form of Bond to the Sheriff for the redelivery of Property.

Know all men by these presents, that we, C. D., E. F. and G. H., are held and firmly bound to S. S., Sheriff of the county of —, in the penal sum of — dollars, for the payment of which, we jointly and severally bind ourselves. Sealed with our seals, this — day of —, A. D. —.

The condition of the above obligation is such, that whereas the said sheriff, by virtue of an execution issued on the day of [&c.] at the suit of A. B. against the said C. D., by the Court of Common Pleas of said county, for the sum of \$ —, debt, \$ —, damages, \$ —, costs, \$ —, increase costs, &c., has seized the following goods and chattels of the said C. D., to wit: [*here describe the property.*] And which said property remains upon the hands of said sheriff [for reasonable cause; or *state the cause,*] and the said sheriff has, at the request of the above named obligors, delivered said property to the said C. D.:

Now, if the said goods and chattels shall hereafter be delivered by the said C. D. to the said S. S., or any other officer holding an execution for the sale of the same in said suit, at the time and place appointed by the said S. S., or said other officer, according to law, this obligation shall be void, otherwise in full force.

C. D., [SEAL.]

E. F., [SEAL.]

G. H., [SEAL.]

(d) 2 Ohio Rep. 297.

(e) Id. lb.

(f) Id. lb.

(g) 6 Ohio Rep. 450.

(h) See 6 Ohio Rep. 450; Wright's Rep. 337.

Expenses of Live Stock — Advertisement and Sale.

11. *Expenses of keeping Live Stock.*

Although there is no provision in the statutes relating to the expenses of keeping live stock after seizure, the officer must provide for their support¹ unless kept by the defendant; and the expenses incurred by the officer are allowed by the court, out of the proceeds of the sale.

12. *Advertisement of the Sale of Goods.*

Public notice must be given of the time and place of sale for at least ten days before the day of sale; which notice must be given by advertisement in some newspaper printed in the county; or, in case no newspaper be printed in the county, then by setting up advertisements in five public places in the county, two of which advertisements must be put up in the township where the sale is to be had.² No particular place of sale is directed by law.

The notice or advertisement is usually in the form following:

Form of Notice of Sheriff's Sale of Goods.

At — o'clock, A. M., [or P. M., as the case may be,] on the — day of, [&c.,] I shall expose to public sale at —, in the township of —, in the county of —, the following property, to wit: [*here describe the property as thus: Six chairs, forty sheep, one yoke of oxen, two horses, one wagon,*] taken as the property of C. D. on an execution against him from the Court of Common Pleas of said county, at the suit of A. B.

S. S., Sheriff of — county.

[Date.]

13. *How the Sale of Goods to be conducted.*

The goods must be at the place where the sale is made. They must be sold specifically and separately, and not in gross.³ They must be in a situation to be seen, and should be shown to the bidders.⁴

The officer cannot substitute other goods for those advertised.⁴

A bid may be withdrawn at any time before the article is struck off; but when struck off, the sale is complete, and both parties bound by the contract.⁵

The sheriff should not part with the property until the money is paid; if he does, he will notwithstanding be liable for the amount bid.⁶ If the pur-

(i) 1 Salk. 322.

(a) Swan's Stat. 472.

(b) 17 Johns. 116.

(c) 14 Johns. 352.

(d) 14 Ohio Rep. 545.

(e) 3 T. R. 148.

(f) 9 Johns. 96.

What Estate in Lands may be levied on.

chaser refuses to pay, he may retain the property and resell it; or, if there be not time again to sell, make return to that effect.⁴

If the sheriff knows that the property does not belong to the defendant, or that the title is doubtful, he should so state; for, if he knows that the defendant has not title, and conceals it, he will be liable to the purchaser.⁵

The sheriff cannot purchase at his sale.¹

A state of things may occur at a sale, in which it would be the duty of the sheriff to stop the sale, and again advertise and sell at a different place.

Thus, in some neighborhoods, combinations are formed by which property is bid off at a mere nominal sum, for the private benefit of the debtor. So, on the other hand, the plaintiff may be the principal bidder, and the property sacrificed to his rapacity. In either case, the sheriff may exercise his discretion as to postponing the sale.¹

The sheriff can sell only sufficient to pay the judgment and costs; at least, the sale should not materially exceed the amount due on the execution, otherwise the sheriff will be liable to an action of trover.

SEC. III. AS TO REAL ESTATE.

1. *What kind of an Estate in Lands is subject to levy and Sale upon a Judgment.*

In general, land, not in the possession of the judgment debtor, but in which he has an equitable estate only, cannot be levied upon as his property.² Thus, if the judgment debtor has a title bond or other contract for land,¹ or a land office certificate,² his estate being an equitable and not a legal one, cannot be sold on execution; yet, in such case, if the judgment debtor is in possession, a bare legal estate exists in him by that possession, and a possessory interest in land may, it seems, be sold on execution.³ And, it still remains an open question, whether the equitable estate of a judgment debtor in possession, be not so connected with his legal estate, as to pass by a sale of the latter to a purchaser on execution.⁴

On the other hand, if the judgment debtor before judgment was rendered against him, entered into a contract for the sale of his land, the judgment will not be a lien on such land, nor can it be sold under the judgment. The judgment debtor, in such case, holds the legal estate in trust for his vendee.⁵ If,

(g) 5 Cowen, 390; 3 Ohio Rep. 449; 1 Pet. C. C. Rep. 241. If a purchaser refuses to pay, the sheriff may offer the property again, and the first purchaser will be liable for the difference between his bid and the price for which the property is finally sold; 4 Bing. 722.

(h) 5 Taunt. 657.

(i) Swan's Stat. 477.

(j) 2 Cowen, 139; 4 Johns. 345.

(k) 7 Ohio Rep. (Part 1,) 249; 11 Ohio Rep. 355.

(l) 1 Ohio Rep. 257.

(m) 1 Ohio Rep. 281.

(n) 7 Ohio Rep. (Part 1,) 228; 5 Ohio Rep. 48; 8 Ohio Rep. 21.

(o) 7 Ohio Rep. (Part 1,) 228

(f) 1 Ohio Rep. 257.

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however, the land be levied upon and sold under the judgment to a bona fide purchaser, without notice of the previous contract of sale made by the judgment debtor, the purchaser under the judgment will hold the land.

So, if a debtor, before judgment is rendered against him, convey land bona fide, although in satisfaction of a pre-existing debt, and execute a defective conveyance which does not pass the legal title, the equity of the purchaser is superior to that of the judgment creditor, and a court of chancery will interfere accordingly.⁵

Mortgaged premises may be sold on an execution issued against the mortgagor ;⁶ but as the land must be appraised and sold as unencumbered property,⁷ the right is of little practical benefit, except to secure any balance which may arise upon the foreclosure and payment of the mortgage. The fact, therefore, that lands levied on are under a prior mortgage, is a good reason for setting aside a levy, in order to seize other unincumbered lands.¹

It is said, that lands in the hands of a mortgagee cannot be sold on an execution against him, until the equity of redemption is foreclosed.⁸

If the mortgagor takes a common law judgment on the debt secured by the mortgage, he may levy on the mortgaged premises ; and a purchaser will take an indefeasible estate relieved of the mortgage lien, although the money made is insufficient to satisfy the mortgage.¹

A deed of trust passes the legal title, and though given to secure a debt, and so drawn as to be treated for most purposes as a mortgage, yet, as between the grantor and grantee, the estate passes, so that nothing remains in the grantor which can be levied upon and sold upon execution.⁹

When there has been a conveyance of land by a judgment debtor to defraud his creditors, the land may be levied upon and sold as his, and the purchaser test the title by an action of ejectment, or clear up the title by proceeding in chancery.² And where such a conveyance is made, and there is a judgment against the fraudulent grantee, the land may be seized and sold as his, and the purchaser at the execution sale, although he have notice of the fraud, will hold the land as against all the world, except the creditors of the fraudulent grantor.³

Permanent leasehold estates, that is, leasehold estates renewable forever, are treated as real estate.⁴

When there are tenants in common, and a judgment had against one of them, the levy should be made upon his undivided estate, or share. Where, however, there were three tenants in common, of sixty acres of land, and a levy

(g) 3 Ohio Rep. 527.

(h) 2 Ohio Rep. 223 ; 14 Ohio Rep. 318 ; 10 Ohio Rep. 71 ; 8 Ohio Rep. 21 ; 9 Ohio Rep. 28.

(i) 12 Ohio Rep. 79.

(j) 10 Ohio Rep. 444. One who purchases at Sheriff's sale the right of a mortgagor in possession, may redeem : *Stratton vs. Sabin*, 9 Ohio Rep. 28.

(k) 8 Ohio Rep. 224 ; see 4 Johns. Rep. 41 ; 5 Johns. Ch. Rep. 570.

(l) 15 Ohio Rep. 84 ; *Id.* 467.

(m) 16 Ohio Rep. 469.

(n) *Wright's Rep.* 117.

(o) 10 Ohio Rep. 162.

(p) 13 Ohio Rep. 361 ; *Swan's Stat.* 289 ; see 3 *McLean*, 235 ; 5 Ohio Rep. 304 ; 12 *do.* 212 ; 3 Ohio Rep. 465 ; *Chase's Stat.* 1185.

When and how Levy made on Real Estate.

and sale of the right of two of them in forty three and one half of the sixty acres, by metes and bounds, it was held good for their undivided shares within such metes and bounds.^q

Lands which have descended to the judgment debtor from his ancestor, may, of course be taken in execution and sold; subject, however, to the rights of the administrator, in case they are needed to pay the ancestor's debts.^r

By statute which took effect on estates and debts after July 4th, 1846, the interest of a married man in the real estate of his wife, belonging to her at the time of their intermarriage, or, which may have come to her by devise, gift, or inheritance during coverture, or, which may have been purchased with her sole and separate money or other property, and during her coverture shall have been deeded to her, or to any trustee in trust for her, cannot be taken for the payment of his debts during the life of the wife, or the life of any heirs of her body.^s

By an act of Feb. 5th, 1847, the property of the wife, acquired subsequent to July 4th, 1846, is exempted from executions, either upon prior or subsequent contracts or debts of the husband.^t

A lot appropriated for the use of a common school on which a school house is erected, occupied for the purpose of accommodating a common school, from time to time, in the usual manner, is exempt from execution, however and whomsoever may hold the title thereto. But such lot, if situated without the bounds of a city or recorded town plat, must not exceed two acres, and if in a city or recorded town plat, must not exceed one acre; and if the boundaries be uncertain, the school directors or other person or officer having charge of the school house thereon, must, at the request of the officer holding the execution or order of sale, cause the lot exempted from sale to be surveyed, and the boundaries ascertained.^u

Lands appropriated and set apart for burial grounds, either for public or private use, and so recorded in the recorder's office; and burial grounds that may have been used as such for fifteen years, or lots sold by a cemetery association and used for burial purposes, and without view to profit, are exempt from execution.^v

2. *When and how Levy made upon Real Estate.*

The want of goods and chattels authorizes the officer to levy upon real estate. If there be any goods and chattels, the officer generally makes a levy upon them, advertises and sells them, and then, to satisfy the balance due on the execution, levies upon real estate.

(q) 6 Ohio Rep. 391.

(r) 16 Ohio Rep. 271.

(s) 44 vol. Stat. 75.

(t) 45 vol. Stat. 23. Query, whether this act can operate so as to exempt property acquired

before its passage, from the payment of debts contracted before that time.

(u) 40 vol. Stat. 51 § 17.

(v) Swan's Stat. 165, 166; 46 vol. Stat. 99.

The officer's return, however, of no goods, is, as between the parties to the execution, conclusive.*

The officer does not in general go upon the land to make his levy on it; but obtains from the recorder's office a description of the real estate, and enters it upon the execution with the time of doing so.

The description of the land need not necessarily be by metes and bounds, though it is always advisable to make it as definite as the sources of information, accessible to the officer, will permit.

Where the levy described the land thus: "Seventy acres in the south west corner of section two, township three, range five," it was held that the description was good for seventy acres of land in the corner, in a square form.†

The decisions of our courts have not been very uniform, in regard to the certainty of description required to render a levy valid.‡ But the general rule is, that the description must, at least, be so definite, that the land can be located, otherwise the levy will be void.§ And yet it is held, that, although a levy on one hundred acres of land, in section four, township seven, range four, is too uncertain, it may be helped out by parol testimony.¶ So, a levy on "out lot number five, and two thirds of out lot number one," is void for uncertainty, but may be made good by parol evidence.‡

A vague and uncertain levy may be cured by a definite description in the appraisement.‡

The statute provides‡ that "in all cases where two or more executions shall be put into the hands of any sheriff or other officer, and it shall be necessary to levy on real estate, to satisfy the same, agreeably to the provisions of this act, and either of the judgment creditors in whose favor one or more of said executions is issued, shall require of the sheriff or other officer, to make a separate levy to satisfy his execution or executions, it shall be the duty of the sheriff or other officer, to levy said executions, or so many thereof, as may be required, on separate parcels of the real property of the judgment debtor or debtors; giving to the officer making the levy on behalf of the creditor, whose execution may by this act be entitled to a preference, the choice of such part of the real property of the judgment debtor or debtors, as will be sufficient, at two thirds of the appraised value, to satisfy the same. And in all cases where two or more executions, which, by the provisions of this act, are entitled to no preference over each other, are put into the hands of the same officer, and such officer may be required to levy the same on real property, it shall be the duty of the sheriff or other officer, when so required, to levy the same on separate parcels of the real property of the judgment debtor or debtors, when, in the

(w) 1 McLean, 246.

(x) 2 Ohio Rep. 327.

(y) See 2 Ohio Rep. 327; 10 do. 42; 16 do. 42; 16 Ohio Rep. 16.

16; 6 do. 398; 3 do. 272; 5 do. 522.

(z) 10 Ohio Rep. 42; 14 Johns. 352; 13 Johns.

537.

(a) 3 Ohio Rep. 272.

(b) 5 Ohio Rep. 522; and see 10 Ohio Rep.

42; 16 Ohio Rep. 16.

(c) 2 McLean, 59.

(d) Swan's Stat. 477.

Appraisement of Real Estate.

opinion of the appraisers, the same may be divided without material injury ; and if the real property of said debtors will not be sufficient, at two thirds of its appraised value, to satisfy all the executions chargeable thereon, such part of said real property shall be levied on, to satisfy each execution, as will bear the same proportion in value to the whole of said real property, as the amount due on the execution, bears to the amount of all the executions chargeable thereon, as near as may be, according to the value of each separate parcel of said real property, as assessed by the freeholders, agreeably to the preceding sections of this act."

3. *Appraisement of Real Estate.*

An inquest of three disinterested freeholders, who are resident in the county where the lands are situate, must be called. to whom an oath is administered by the officer, to impartially appraise the estate.* These freeholders must return to the officer, under their hands and seals, an estimate of the real value, in money, of the estate, upon actual view of the premises, forthwith after such view.*

The officer receiving the return, must, forthwith, deposite a copy thereof with the clerk of the court from which the writ issued.*

When the sheriff holds several executions, which are levied on the same land, he need only appraise and sell under one, and the court will appropriate the proceeds of the sale according to law.†

The annual crops growing upon the land are not included in the appraisement.*

The title may be in such condition, that some third person may be entitled, under the occupying claimant law, to certain improvements erected thereon ; in which case, those improvements need not be estimated in the valuation of the land.‡

Lands mortgaged are appraised as if unencumbered,‡ and are purchased on the execution subject to the mortgage.‡

A life estate, such as that of curtesy or dower, is estimated by deducting the value of the remainder, and may be estimated by ascertaining the clear yearly rents, and then estimating the value of a life annuity, by the common annuity tables.‡

No appraisement is made in the following cases, namely : Where the judgment is for a debt or taxes due the state ;‡ and a fine for an assault and battery

(e) Swan's Stat. 473.

(f) 5 Ohio Rep. 225.

(g) 12 Ohio Rep. 88 ; 2 Ohio Rep. 95.

(h) 9 Ohio Rep. 19.

(i) 8 Ohio Rep. 21 ; 10 do. 72 ; 15 do. 106 ; 12 do. 79 ; 11 do. 450.

(j) 11 Ohio Rep. 450.

(k) 12 Ohio Rep. 79.

(l) Swan's Stat. 474.

Form of Appraisement of Real Estate.

is a debt due the state ;^m where the judgment is against a delinquent county treasurer and his securities, or a delinquent deputy treasurer.ⁿ

So, where the judgment is for money collected or received by any clerk, sheriff, coroner, justice of the peace, constable, or any collector of state, county, town or township taxes, in their official capacity.^o In all such cases the property is sold to the highest bidder without appraisement.

Form of Appraisement.

A. B. }
v. } On Execution.
C. D. }

Inquisition taken January 11, 1860, at the township of —, in — county, Ohio :

Whereas, the Sheriff of — county, by virtue of a writ of fieri facias, [*or vendi,*] issued from the Court of Common Pleas of said county, returnable to their — term, A. D. —, on a judgment in favor of A. B. against C. D., has levied upon the following described lands and tenements as the property of said C. D., to wit, [*here describe the premises.*]

Now we, the undersigned, J. K., L. M. and N. O., three disinterested freeholders and residents of said county, summoned by the said sheriff to appear at the time and place first above mentioned, to appraise said premises, met, and after actual view of said premises, and forthwith after such view, do find and estimate the real value in money of said premises to be — dollars.

In testimony whereof we have hereunto set our hands and seals the day and year first above written.

J. K., [seal.]

L. M., [seal.]

N. O., [seal.]

Attest : S. S., Sheriff — county.

I do certify that the above named appraisers were disinterested freeholders and residents of said county, and were duly sworn by me to impartially appraise said lands and tenements, on the day and year in said inquisition mentioned, and that the above is the return of their appraisement in the premises.

S. S., Sheriff of — county.

[*Date as above.*]

Form of Appraisement where a former Appraisement has been set aside.

Title, date, &c., as above.

Whereas, the sheriff of said county holds a vendi. issued from the Court of Common Pleas of said county, returnable to their — term, A. D. —, on a judgment in favor of A. B. against C. D., and the lands and tenements hereinafter described, were levied upon as the property of said C. D., by virtue of a fieri facias heretofore issued on said judgment, appraised, and the appraise-

(m) 2 Ohio Rep. 327.

(n) Swan's Stat. 474, 967.

(o) Swan's Stat. 474.

Setting aside Appraisement — Advertisement of Real Estate.

ment set aside and a new appraisement ordered; and which said lands and tenements are described as follows: [*Here describe the premises.*]

Now we, [*&c., proceeding as in the preceding form to the end.*]

4. *Setting aside Appraisement.*

Where real estate is taken on execution and appraised, and twice advertised and offered for sale, and remains unsold for the want of bidders, the court must, on motion of the plaintiff, set aside the appraisement and order a new appraisement to be made; or set aside the levy and appraisement, and award a new execution to issue, as the case may require.^p

Setting aside an appraisement, or quashing a *vendit*, does not of course disturb the levy.^q

On a motion to set aside a sale for want of appraisement, a return of the sheriff on the execution that he "duly appraised, advertised and offered for sale," &c., is *prima facie* evidence of an appraisement and its return.^r

5. *The Advertisement and Sale of Real Estate.*

Lands and tenements cannot be sold until the officer cause public notice of the time and place of sale to be given for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county; or in case no newspaper be printed in the county, then in some newspaper in general circulation therein, and by putting up an advertisement upon the court house door, and in five other public places in the county, two of which must be put up in the township where such lands and tenements are situate.^s

Sales made without such advertisement, will be set aside by the court, on motion, at the return term of the execution.^t

If there be a newspaper printed in the county, it is sufficient for the officer to advertise the sale in it: notices need not, in such case, be set up in other places.^u

The first advertisement must be at least thirty days before the sale; and an insertion, perhaps, is not required in each paper issued between the date of the first insertion, and the sale.^v

The publication in a paper, the circulation of which is limited to a portion of the county, as a city therein, is not sufficient.^w After confirmation of a sale, however, even the entire want of notice, as required by law, will not affect the title of a bona fide purchaser at the sale.^x

(p) Swan's Stat. 481.

(q) 1 Ohio Rep. 465.

(r) 9 Ohio Rep. 37.

(s) Swan's Stat. 474, §14.

(t) 2 Ohio Rep. 78.

(u) 16 Ohio Rep. 563; 13 Ib. 128.

(v) 16 Ohio Rep. 563.

(w) 9 Ohio Rep. 19; 3 Ib. 187.

Sale of Real Estate.

The officer may refuse to advertise, unless the fees of the printer are advanced.²


Form of Advertisement of Sale of Real Estate.

SHERIFF'S SALE OF REAL ESTATE.

By command of an execution from the Court of Common Pleas of _____ county, I shall expose to public sale, at the door of the court house, in _____, on the _____ day of _____, A. D. _____, at _____ o'clock A. M., [or P. M., or say, between the hours of _____ and _____ o'clock P. M.,] the following described property, to wit: [*Here describe the property.*] Levied on as the property of C. D., at the suit of A. B. Appraised at \$_____.

[*Date.*]

S. S., Sheriff of _____ County.

 *To Printer: Publish weekly until day of sale.*

A sheriff may, in his discretion, divide a tract of land appraised entire, and sell it in parcels, being liable for any abuse of that discretion.³

Where lands subject to a judgment lien are sold out, from time to time, by the judgment debtor, the sheriff, in making sale upon the judgment, should put up the tracts in the inverse order of the sales made by the judgment debtor; that is, begin at the last and so on to the first.⁴ At least, such is the safest course for the judgment creditor; for, a court of chancery would interfere, at the instance of the purchasers from the judgment debtor, so as to protect the last purchasers.

If a purchaser at sheriff's sale refuses to pay the money, the sheriff, it seems, is not bound to make himself liable and sue the purchaser, by treating the bid as a sale.⁵ The purchaser undoubtedly could be made liable on his bid, and if the judgment creditor desire the property to be returned as sold to such bidder, for the purpose of enforcing the sale, at the same time exonerating the sheriff from responsibility, the sheriff should make return of the sale; otherwise he may return that there was no sale.

(x) Swan's Stat. 477.

(y) The laws relating to the fees of printers for legal advertisements is in this condition:—The act of March 12, 1844, fixed the fees for advertising judicial sales, &c., and delinquent tax lists, &c.; 42 vol. Stat. 43. By act of Feb. 28, 1846, public officers, &c., were authorized to advertise in adjoining counties, if they could not procure their advertisements to be published at the rates fixed by the act of Feb. 28, 1846, in their own county: "provided, that in no case shall a greater price be allowed than is fixed in said act;" 44 vol. Stat. 70. An act was passed

March 9, 1849, entitled "an act fixing the prices of printers for publishing the delinquent and forfeited lists," in which is fixed the rates for such publications only, and provides that "the act, fixing the prices of printers for the insertion of legal advertisements, passed March 12, 1844, be and the same is hereby repealed;" 47 vol. Stat. 40. This last named act takes no notice, by repeal or otherwise, of the above mentioned act of Feb. 28, 1846.

(z) 9 Ohio Rep. 19.

(a) 10 Ohio Rep. 414; and see 14 Ohio Rep. 365.

(b) 3 Ohio Rep. 449.

Confirmation of Sale of Real Estate.

6. *Confirmation of Sale on Execution.*

The statute provides,* that if the court to which any execution shall be returned by the officer, for the satisfaction of which any lands and tenements may have been sold, shall, after having carefully examined the proceedings of such officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of the act regulating judgments and executions, they shall direct their clerk to make an entry thereof on the journal, that the court are satisfied of the legality of such sale, and an order that the said officer make to the purchaser a deed for such lands and tenements.

The form of the order confirming the sale may be as follows :

Form of Order confirming a Sale, &c.

A. B. }
v. } On Execution returned to this Term. Sale to _____.
C. D. }

The court this day carefully examined the proceedings and sale of the sheriff upon the execution issued herein, as required by law, and are satisfied of the legality of said sale, and that the same was in all respects made in conformity to the law ; and do order the sheriff to make to the purchaser a deed.⁴

On a motion for confirmation of sale, and an order to the sheriff to make a deed, the court, in general, look only to the execution on which the sale was made, and the proceedings under it ; irregularities previous to the issuing of the execution, or in the issuing of the execution, can only be taken advantage of by motion to set aside the proceedings.*

The court, however, exercise a discretionary power, in withholding a confir-

(c) Swan's Stat. 474, sec. 15.

(d) The form of the confirmation of a sale in Wilcox's Practice, is as follows :

"The court this day having examined the proceedings of the sheriff and the sale by him made, upon the execution issued in this cause, and being satisfied that said sale has, in all respects, been made in conformity to the provisions of the statute in such case made and provided, do order the clerk to make an entry on the journal, that the court are satisfied of the legality of the sale, and that he also enter an order on the sheriff to make to the purchaser a deed for the lands and tenements so sold ; all which is entered accordingly."

The objection to this form, and also to the form given in the text, is, that they both contain more than is necessary. The statute, so far as it requires the court to examine the proceedings of the sheriff, is directory. and if they state on

their journal that they are satisfied of the legality of the sale, it will be presumed that they examined the proceedings. All entries on the journal of the court are made by the direction of the court. If the court are satisfied of the legality of the sale, they are of course satisfied that the sale has in all respects been made in conformity to the provisions of the statute—it is mere tautology to find that they are satisfied of both. Besides, the statute only requires an entry that the court are satisfied of the legality of the sale and an order for a deed.

It is submitted, whether the following entry would not be sufficient :

The court are satisfied of the legality of the sale made by the sheriff, upon the execution issued herein, and do order him to make to the purchaser a deed.

(e) 2 Ohio Rep. 360.

Confirmation of Sale of Real Estate.

mation of a sale, even where the letter of the statute has been complied with. Thus, where notice was given of the sale as required by law, yet the court being satisfied that the notice was not published in a paper of general circulation in the county, refused to confirm the sale.¹

If the term of service of the sheriff or other officer who made the sale has expired, or he is absent or unable by death or otherwise to make the deed, the succeeding sheriff or other officer, (on receiving a certificate from the court from which the execution issued, signed by the clerk by order of the court, setting forth that sufficient proof hath been made to said court that such sale was fairly and legally made; and, on tender of the purchase money, or if the purchase money or any part thereof has been paid, then, on proof of such payment and tender of the balance, if any there be,) may execute a deed to the purchaser or his legal representatives.²

A deed may be ordered by the court, on examining proceedings under an execution, although a long space of time, even fifteen years have elapsed since the sale.³

Where a coroner makes a sale, and goes out of office before making a deed, and then a new sheriff and a new coroner come into office, the new sheriff, it seems, is so far the successor of the old coroner, that he ought to make the deed to the purchaser.⁴

The order of the court in such case may be in the form following :

Form of order directing the present Sheriff to make a deed for lands sold by his predecessor.

A. B. } On Execution No. ———,
v. } returned to ——— Term, A. D. ———, Sale to ———.
C. D. }

The term of service of J. G., late sheriff of this county, who made sale upon said execution issued in this cause, having expired; and said sheriff having failed to make a deed to the purchaser, and sufficient proof having been made to the court, now here, that said sale was fairly and legally made, it is ordered that the clerk of this court sign a certificate thereof, and that the present sheriff upon receiving said certificate and the proof of payment or payment as required by law, execute to the purchaser a deed for the lands and tenements so sold.

7. *Deed of the Sheriff.*

A deed should not be made until after the sale is confirmed by the court and the sheriff is ordered to make it.⁵

(f) 16 Ohio Rep. 563.

(g) Swan's Stat. 478, Sec. 20.

(h) 4 Ohio Rep. 45.

(i) 9 Ohio Rep. 235.

(j) 1 Ohio Rep. 378; 9 O. R. 217.

Deed of the Sheriff.

The deputy sheriff may make the deed in the name of the sheriff.¹ But a coroner's deed made while there is a sheriff is invalid.²

A deed executed by a sheriff while in office, but acknowledged after his term has expired, is good, by relation, from the time of its execution.¹ But an acknowledgement by a deputy after the death of the sheriff, is void.²

The deed may, it seems, be made to an assignee of the original purchaser, or his heirs.³

The deed need not recite all the executions that may have issued before the one on which the sale was made: all that is necessary is, to show that the sheriff acted under the execution.⁴

The deed will be void if the description of the premises is so uncertain that the land cannot be located;⁵ but, it seems, parol testimony will be received, as well to help out the description, as to show that the land described in the deed, was not, in fact, levied upon.⁶

It seems, where the deed *and execution* recite a judgment in the common pleas, and the only judgment offered in evidence is one in the supreme court, remanded to the common pleas for execution, the sale will not be sustained.⁷

But a reference in an execution to a judgment in the supreme court, where the judgment upon which it issued was, in fact, in the court of common pleas, does not invalidate the sale: the word supreme court may be stricken out as *surplusage*.⁸

The statute requires the deed of the sheriff to recite the execution or executions, or the substance thereof, and the names of the parties, the kind of action, the amount and date of the term of the rendition of the judgment, by virtue whereof the premises were sold.¹ The deed must be acknowledged, attested and recorded, as other deeds.¹

The form of a sheriff's deed must of course vary in its recitals, according to the nature of the judgment, and the proceedings in each case.

The following is the form of a common deed:

Form of Sheriff's Deed.

To all to whom these presents shall come:

Whereas, at the — term A. D. 18 — of the Court of Common Pleas of — county, Ohio, begun and held on the — day of — A. D. —, A. B. recovered a judgment in an action of [*here name the action,*] against C. D. for the sum of — dollars [*debt or damages, as the case may be, and — dollars damages,*] and — dollars — cents, costs.

And whereas, the said A. B., on [*the teste day of the writ under which the levy was made,*] day of —, A. D. —, caused to be issued out of said court a writ of execution, called a fieri facias, upon said judgment, directed to S. S.,

(j) 4 Ohio Rep. 88; 9 Ohio Rep. 151.

(k) 11 Ohio Rep. 235.

(l) 8 Ohio Rep. 87.

(m) 9 Ohio Rep. 151.

(n) 7 Ohio Rep. (Part 1) 198, 204.

(o) 8 Ohio Rep. 128; 10 Ohio Rep. 433.

(p) 10 Ohio Rep. 42; see 2 Id. 272, 5 Id. 523; 2 Id. 327; 16 Id. 16.

(q) 8 Ohio Rep. 272; 5 Id. 522; 6 Id. 536; 16 Id. 16.

(r) Wright's Rep. 59.

(s) 3 Ohio Rep. 272.

(t) Swan's Stat. 476.

Deed of the Sheriff.

Sheriff of said county, returnable on [&c.,] by which the State of Ohio commanded said sheriff that of the goods and chattels, [&c., *here reciting the whole writ in the past tense.*

And whereas, the said sheriff having received, and indorsed on said writ "no goods," did, on the — day of —, A. D. 18 —, levy by virtue of said execution, on the following described lands and tenements as the property of said C. D., to wit: [*Here describe the lands. If not sold on the fi. fa., state the return on the fi. fa. and then recite the issuing of the vendi upon which the lands were sold, as the issuing of the fi. fa. is above recited, and then such of the following facts as are not before stated in the return to the fi. fa.*] — And whereas, afterwards, to wit: on the — day of —, A. D. —, the said S. S., Sheriff, caused said premises to be duly appraised according to law, and forthwith deposited a copy of said appraisement, in the clerk's office of said court; and, having caused the time and place of the sale of said premises to be advertised for thirty days in the —, a newspaper published, and of general circulation in said county, did, by virtue of said [last mentioned] writ, at the time and place mentioned in said advertisement, to wit: on, [&c.] at the court house in —, in said county, expose said premises at public sale, and T. S., having then and there bid for said premises — dollars, and he being the highest and best bidder, and that sum being more than two thirds of the appraised value of said premises, the same were struck off and sold by said sheriff, to said T. S. And whereas, the said sheriff, having made due return of said writ, and his said proceedings in the premises, to said court, according to the command of said execution, at the — term, A. D. —, of said court;* and said court, at the — term —, A. D., 18 —, having examined the proceedings and sale aforesaid, and being satisfied of the legality of said sale, and that the same was in all respects in conformity to the law, ordered the said S. S., sheriff, to make to said T. S., a deed for said premises.*

Now, therefore, I, the said S. S., sheriff as aforesaid, in pursuance of the sale and order aforesaid, and in consideration of the sum of — dollars, to me in hand paid by said T. S., the receipt whereof is hereby acknowledged, have bargained and sold, and do hereby grant, bargain, sell, release and convey, to the said T. S., his heirs and assigns forever, the premises above described, with their appurtenances; and all the right, title, and estate, of the said C. D., in and to the same. To have and to hold said premises, with the appurtenances, unto the said T. S., his heirs and assigns forever, in as full and ample an estate as I, the said S. S., as said sheriff, can, or ought to convey the same by virtue of the proceedings aforesaid.

In testimony whereof, I, S. S., sheriff of said county, have hereunto set my hand and seal, this — day of —, A. D. —.

S. S., [SEAL.]
Sheriff of — county.

Signed, sealed, and delivered in presence of
T. M.,
J. K. }

Rights of Purchasers from a Judgment Debtor.

The State of Ohio, — County, ss.

Be it remembered, that on the — day of —, A. D. —, before me, G. H., [a justice of the peace, in and for said county,] personally appeared the above named S. S., sheriff of said county, and acknowledged the above conveyance to be his voluntary act and deed as said sheriff. In witness whereof, I have hereunto set my hand [and seal] the day and year aforesaid.

G. H., Jus. Peace,
— township, — county.

If the sale is made by a sheriff whose term of office has expired, and a certificate is issued for the successor to make the deed, the fact should be recited at one of the stars in the above form: that is, at the first star, if the sale was not confirmed before the sheriff who made the sale went out of office, or at the last star, if the sale had been confirmed. The fact may be stated thus:

And whereas, the term of service of the said S. S., as said sheriff, who made said sale, having expired; and said sheriff having failed to make a deed to said T. S., the said court at their — term, A. D. —, ordered that a certificate, signed by their clerk, should issue to S. A., the present sheriff of said county, setting forth that sufficient proof had been made to said court, that said sale was fairly and legally made, and that said S. A., on payment of the purchase money or balance due, or proof of payment theretofore made, should execute a deed to the said T. S. for said premises; and which said certificate has been duly issued to said S. A. And whereas, proof being made to the satisfaction of said S. A. that said purchase money was fully paid to said S. S. by said T. S., [or according to the facts.] Now, therefore, [&c., as in the above form; but acknowledging the consideration as having been paid according to the facts.]

8. *The rights of purchasers of lands from the Judgment Debtor as against the Judgment Creditor, or purchasers under the Judgment.*

Lands lying under a judgment lien which have been sold out to purchasers by the judgment debtor, must be sold to satisfy the judgment in the inverse order of the dates of the purchases."

And where land is purchased from a judgment debtor, the purchaser may, in equity, require the property of the debtor, or lands subsequently sold by him, to be first exhausted in satisfaction of the judgment."

But after a sheriff's deed is delivered, it is too late to object that the judgment debtor had himself sold the lands levied on, and still owned other lands liable to execution."

The purchaser at sheriff's sale without notice of a dormant equity prior to the return of the execution satisfied, takes title as a bona fide purchaser with-

Forms of Returns.

out notice, although the sheriff's deed bears date subsequent to actual notice given after the sale.*

A purchaser at a judicial sale will overreach a purchaser of the mortgagor, who made his purchase pending an appeal from the Court of Common Pleas to the Supreme Court — judgment in the Common Pleas having been against the mortgagor.†

Where lands lie in one county, and a judgment is rendered in another, and the lands are seized in execution, sold, sale confirmed, and deed ordered; and afterwards, but before the actual execution of the sheriff's deed, a deed, more than one year old, from the judgment debtor to a stranger, (and made before the levy of the execution,) is placed on record: in such case, the purchaser under the execution has the better right; for he must be regarded as a bona fide purchaser from the time of the sale, and not merely from the time the sheriff makes him a deed.‡

A levy upon goods and chattels sufficient to pay the judgment, is, for some purposes deemed a satisfaction of the judgment. Thus, where such a levy was made, and the judgment debtor sold his real estate to a bona fide purchaser, and afterwards by consent of parties the goods and chattels were restored to the defendant, the court decided that the purchaser held the real estate discharged from the lien of the judgment.§

SEC. III. FORMS OF RETURNS TO FIERI FACIAS, AND VENDITIONI EXPONAS.

1. *No Goods, &c., to Fi. Fa.*

The within named A. B. hath no goods or chattels, lands or tenements within my county, whereof I can cause the within mentioned judgment and costs, or any part thereof, to be made, as within I am commanded.

Fees:

S. S., Sheriff of — county.

[Date.]

(Or, briefly,)

No goods or chattels, lands or tenements [or No property] found whereon to levy.

2. *No Goods, to Fi. Fa., against an Administrator.*

The within named C. D. hath no goods or chattels within my county, which were of the within named E. F., deceased, at the time of his death, in the hands of said C. D., to be administered, whereof I can cause the within

(x) 15 Ohio Rep. 285.

(y) 15 Ohio Rep. 365.

(z) 9 Ohio Rep. 184.

(a) 7 Ohio Rep. (part 2) 148.

Forms of Returns.

mentioned judgment and costs, or any part thereof, to be made, as within I am commanded.

S. S., Sheriff of — county.

3. Money made from Goods.

January 9, 1860.—Made of the goods and chattels of the within named A. B., the amount of this execution.

Debt-----	\$-----
Damages-----	\$-----
Interest-----	\$-----
Costs-----	\$-----
Increase costs-----	\$-----

Fees:

S. S., Sheriff of — county.

4. Made by Money received.

January 9, 1860.—Money made in full.

Debt-----	\$-----
Damages-----	\$-----
Interest-----	\$-----
Costs-----	\$-----
Increase costs-----	\$-----

Fees:

S. S., Sheriff of — county.

5. Money made in Part.

January 9, 1860.—Made the sum of----- \$-----

Deduct my commissions ----- \$-----

Balance to credit of this Execut'n \$-----

No more goods or chattels, and no lands or tenements found, of which the residue or any part thereof can be made.

S. S., Sheriff of — county.

Forms of Returns.

6. *Levy on Goods, and no Sale.*

January 9, 1860.—Levied on the goods and chattels of the within named C. D., described in the schedule* hereunto annexed marked B., [estimated to be of sufficient value to satisfy this execution; *or say, if the fact be so, no more goods and chattels, and no lands or tenements found whereon to levy.*]

January 26, 1850.—Exposed said goods and chattels to sale, but the same would not sell for want of bidders.

Fees:

S. S.

(B)

A. B. }
v. }
C. D. }

Schedule of property levied upon, &c., by virtue of the annexed writ: Six sheep, [&c.]

S. S., Sheriff — county.

[Date.]

7. *Levy on Real Estate and no Sale for want of Time, or Printer's Fees or Bidders.*

No goods and chattels found whereon to levy.

January 10th, 1856.—Levied on lands and tenements as the property of the said C. D. in said county of —, described as follows: [*Here describe the real estate.*]

[No other lands or tenements found whereon to levy.]

January 12th, 1856.—Caused the said premises to be appraised by the oaths of E. F., G. H. and I. J., (three disinterested freeholders, resident in said county, who were by me duly sworn to impartially appraise said premises,) as per copy of appraisement forthwith thereafter returned.* Not advertised for sale for want of [time, *or say printer's fees, which the plaintiff neglected and refused to furnish, or say, Advertised for sale but not sold for want of bidders.*]

Fees:

S. S., Sheriff of — county,

By C. M., Deputy Sheriff.

[Date.]

8. *Levy on Real Estate, and Sale.*

*Follow the preceding form to the *, and then proceed as follows:]* I adver-

(a) The Statute requires a schedule to be returned when goods are returned unsold for want of bidders; Swan's Stat. 472, 473.

Forms of Returns.

tised said premises for sale at the Court House in —, on the — day of —, A. D. —, at — o'clock, A. M., [or P. M., or say, between the hours of, [*&c., according to the fact,*] in a newspaper published and of general circulation in said county, called the —, and after so advertising the same for more than thirty days previous to said day of sale, I publicly offered said premises for sale at the said time and place so advertised, and S. T. having then and there bid for the said premises — dollars, and the same being more than two-thirds the appraised value of said premises, and he being the highest and best bidder, I struck off and sold the same to him.

Made ————— \$ —.

Fees: [*items.*] —————

S. S., Sheriff of — county,
By D. S., Deputy Sheriff.

9. Stayed by Injunction.

January 10, 1860.—This execution stayed by injunction issued from the Court of Common Pleas of — county.

S. S., Sheriff of — county.

10. Stayed by Plaintiff.

Procure the indorsement on the execution of the plaintiff's attorney, or his written order, staying the execution, and then indorse:] This execution stayed by order of L. M., attorney for the plaintiff.

S. S., Sheriff of — county.

11. Levy on Goods, and Trial of Right of Property.

January 10, 1860.—Levied on goods and chattels estimated to be of the value of — dollars, which were claimed by E. F., and such proceedings were had by said E. F. before G. H., a justice of the peace of said county, that said G. H. issued his order of restitution in the premises, under the statute in such case made and provided; and I accordingly restored said goods and chattels to said E. F.

No goods and chattels, lands or tenements found whereon to levy.

Fees:

S. S., Sheriff of — county.

[Date.]

Amendment of Return.

12. *Levy on Goods which were taken by Writ of Replevin.*

January 10, 1860.—Levied on the following described goods and chattels :
[*Here describe them.*]

January 12, 1860.—Said goods and chattels were taken from my possession by L. S., the coronor of — county, by virtue of a writ of replevin, issued against me, at the suit of E. F., from the Court of Common Pleas of said county.

No other goods and chattels, and no lands or tenements found whereon to levy.

Fees:

S. S., Sheriff of — county.

[*Date.*]

13. *Return to Vendi. with Fi. Fa. Clause.*

I am of the opinion that I cannot cause the within mentioned money to be made of the property within described. [*Here enter the further levy, proceedings, &c., as in the above forms.*]

SEC. IV. AMENDMENT OF RETURN.

In general, the court will permit the officer to amend his return, according to the truth. The application is addressed to the discretion of the court; and there is no time absolutely fixed as a bar to amendments.^a

But where third persons have acted upon a return made, and their rights will on that account be prejudiced, the court will not in general disturb the return;^b or, where the amendment is proper, as between the parties to the judgment, and therefore allowed, it will not be permitted to operate to the prejudice of third persons.^c

An amendment may be made on application of the administrator of the sheriff.^d

If the order is made to amend and the party to be affected is then in court, he cannot afterwards be heard upon a motion to rescind the order, without offering a valid excuse for not resisting it, when made.^e

(a) 4 Ohio Rep. 45, 64.

(b) 3 B. Monr. 471.

(c) 13 Ohio Rep. 220.

(d) 4 Ohio Rep. 45.

(e) 4 Ohio Rep. 64.

Setting aside Levy — Distribution of Money made.

SEC. V. SETTING ASIDE LEVY.

Where property has been twice offered for sale and not sold for the want of bidders, it would seem, from the terms of the statute, that the defendant may have the levy set aside.^f

Where mortgaged lands are levied upon, the court, on motion of the plaintiff, will set aside the levy, so as to give the plaintiff an opportunity to have an execution levied upon other lands.^g So, if the title of the defendant to the land is shown to be defective, the court will set aside the levy.

If a levy is set aside the rights of the plaintiff, and other execution creditors of the defendant, are precisely the same as if no levy had been made.^h

SEC. VI. DISTRIBUTION OF MONEY MADE.

Where there are two or more judgments or executions against the same defendant, and the plaintiff, on whose execution the property has been sold, has not a priority of lien, or any other judgment creditor is entitled to a distributive share of the money made, the court, on motion, will distribute the money according to the rights of the several parties.ⁱ

If there are several executions, so that it becomes necessary to collate the dates of the judgments, executions and levies, in order to ascertain the legal rights of the judgment creditors, the court, in general, refer the matter to some member of the bar to report upon the subject, and then the court decide the questions.

The orders in such case may be in the form following:

A. B. }
v. } On Judgment and Execution.
C. D. }

E. F. }
v. } On Judgment and Execution.
C. D. }

[*Naming all the cases.*]

This day came the said A. B., by Mr. L. his attorney, and moved the court to order the distribution of the money made on the execution, in the [first] above named case, returned to this term, according to the priorities of lien and levies in the cases above mentioned; and thereupon it is ordered, that Mr. A. collate the dates of said judgments, and the dates of the executions and levies, and the amount of each of said judgments now remaining unpaid, so far as the

(f) Swan's Stat. 481.

(g) 10 Ohio Rep. 444.

(h) 2 Ohio Rep. 895.

(i) 5 Ohio Rep. 225.

Distribution of Money made.

same may be necessary to present for the decision of the court the question made by said motion, and report the priorities of lien and levies in the premises, and the ratable amount of said money made, to which each of said judgment creditors may be entitled, on, [&c.]

[The names of the cases, &c., as before.]

This day came the said A. B., by Mr. L. his attorney, and the said E. F., [&c.,] and the motion made herein on, [&c., or at our last term] for the distribution of the money made on the execution in the [first] above named case, came on to be heard upon the report of Mr. A., and was argued by counsel; on consideration whereof, the court do find that the said judgments are entitled to said money made, by priority, and in the order following :

- 1st. The said judgment of A. B. against C. D. ; and then,
- 2d. The said, [&c.]

And the court do order said money, made, to be paid and distributed accordingly.

(a) If the questions made are to be reviewed by the Supreme Court, insert at (a) the facts as found by the report, thus : "and the court find that the dates of said judgments, and the dates of the executions, and the levies under said judgments, are as follows : [*Here set forth the facts, and all the facts relied upon;*] and this being all the testimony and facts before the court on this motion."

CHAPTER XXXII.

ALIAS, VENDI., AND CAPIAS AD SATISFACIENDUM.

SECTION I. ALIAS, AND VENDITIONI EXPONAS.

II. IN WHAT CASES A CAPIAS AD SATISFACIENDUM MAY ISSUE, AND THE ALLOWANCE THEREOF.

III. PROCEEDINGS OF THE OFFICER, ETC., UNDER A CA. SA.

SEC. I. ALIAS, AND VENDITIONI EXPONAS.

If a part only of the judgment has been levied and made by execution, the plaintiff may sue out an alias fi. fa. for the residue..

If the defendant has escaped from a ca. sa., or the ca. sa. has become ineffectual by the death of the defendant,^b or if the defendant has taken the benefit of the prison bounds,^c or there has been a return of no goods, &c. to a fi. fa., or a return of not found to a ca. sa., the plaintiff may sue out an alias.

Before an execution is executed, the plaintiff may abandon it, and sue out another execution;^d but not after the first is executed. We have already seen^e that the plaintiff may have executions running to different counties at the same time.

If goods or lands levied on, remain unsold, a vendi. may issue.^f

SEC. II. IN WHAT CASES A CAPIAS AD SATISFACIENDUM MAY ISSUE, AND THE ALLOWANCE THEREOF.

We have already pointed out the cases which do not come within the provisions of the non imprisonment act, and in which a capias ad respondendum can be issued, without the particular affidavit required by the non imprisonment act.^g Under the construction given by the Supreme Court to the non imprisonment act, it would seem, that a capias ad satisfaciendum cannot issue, even

(a) See the Form, ante p. 1016.

(b) Swan's Stat. 483.

(c) Id. 486.

(d) Tidd, 912; 1 Blackf. 179.

(e) Ante p. 1011.

(f) Ante p. 1010.

(g) See ante p. 126, 127.

In what Cases Issued.

in such cases, except by order of the court or a judge; and that where a *capias ad respondendum* has been duly issued, in cases provided for by that act, upon affidavit filed, and judgment is had, no *capias ad satisfaciendum* can be issued on the judgment; unless a new affidavit and other proof is adduced, and the court or judge orders the *ca. sa.*, for the causes mentioned in the act.^a

(h) The following remarks of HITCHCOCK, J., will be found in the case of *Hyatt v. Robinson*, 15 Ohio Rep. 357: "Previous to the enactment of the law to abolish imprisonment for debt, it was at the election of the judgment creditor to proceed against the property of his creditor by writ of *fi. fa.*, or against the body of his debtor by writ of *ca. sa.* But since the enactment of that law, judgments cannot be enforced by *ca. sa.*, except in certain specified cases; and an examination of the cases specified will show, that it is only where a debtor attempts to defraud his creditors, can he be arrested and imprisoned. This law is one favorable to the personal liberty of the citizen, and should be liberally construed to effect that object. By this law, no process either *mesne* or final, can issue against the body of a defendant except in pursuance of an order previously made by the court, or a judge of the court from which the process is issued. If it be issued without such order, it is void, as to all persons interested, except the officer to whom it is directed, and voidable as to him." The usually accurate Judge is of course mistaken in saying that an order is required by the non imprisonment act, for the issuing of *mesne* process against the body, and I am authorised by him to say so.

I do not think the Supreme Court have given a correct construction to the non imprisonment act. I suppose all that is said in the statute in relation to a *ca. sa.* is applicable only to cases where no *capias ad respondendum* had been previously issued; in other words, that the statute intended to permit a plaintiff, as a matter of course, to issue a *ca. sa.* on his judgment, if he had regularly sued out a *ca. ad res.*, or held the defendant to bail.

Before the non imprisonment act was passed, a *ca. sa.* could issue as a matter of course, if, by the order of the Court or Judge, a *ca. ad res.* had been previously ordered and issued. The Legislature, in limiting the issuing of a *ca. ad res.* would very naturally provide for the allowance of a *ca. sa.* on judgments and decrees, where the suit had been commenced otherwise than by a *ca. ad res.*; and all that is said in the non imprisonment act as to the issuing of a *ca. sa.* may and as I conceive was intended to apply only, to cases where the defendant had not been previously taken on a *ca. ad res.* The provisions of the non imprisonment act relating to the *ca. sa.* commences thus: "On any judgment or decree, the court when in session, or any judge thereof, in vacation, may order a *ca. sa.*" &c. If this provision itself did not show that the Legislature was dealing with judgments and decrees where there had been no *ca. ad res.* previously issued, which I think it does, the general scope of the

act would of necessity do so. For, most of the causes for issuing a *ca. ad res.* and a *ca. sa.* are the same, and must relate to the same cause for issuing both writs; and if the first was properly issued and the cause for issuing "established," (as it must be, by the express terms of the statute,) it is, to say the least of it, a matter of supererogation to require the same fact in the same case, to be again established for the purpose of charging a party already in custody for the same executed fraud or intended fraud.

But what renders it evident to my mind, that the construction of the statute has been mistaken is this: The object of issuing a *ca. ad res.* is simply and only for the purpose of having the fraudulent defendant forthcoming when a *ca. sa.* is issued on the judgment, or, if he cannot be found, that his special bail may be made responsible. Now under the construction of this law by the Supreme Court, the plaintiff is just as far from having the only benefit of a *ca. ad res.* contemplated by law, after he has procured the process and arrested the fraudulent debtor, as if the process had not issued. For, the statute does not authorize the court or a judge, to allow the issuing of a *ca. sa.* if the defendant has, at the time of the application or previous thereto, actually run away; and special bail cannot be charged, unless a *ca. sa.* is issued and a return made, not found: so that, all that the fraudulent debtor has to do to discharge his special bail, is to run away before an application is made for a *ca. sa.* If he is about to run away, a *ca. sa.* may be allowed; if he has run away, no *ca. sa.* can issue. This is not the fault of the law, but of the construction given to it by the Supreme Court.

No allusion has been made to the first section of the non imprisonment act, because there is nothing in it, which either favors or is opposed to the question of construction under consideration.

The old law allowing the imprisonment of debtors was a barbarous one; inasmuch as it permitted a creditor wantonly to imprison an honest debtor, who had no means of paying his debt. The public mind had so lively a sense of this injustice, and a reform was so manifestly demanded, for the protection of honest and poor debtors, that there still remains a morbid and diseased sympathy even for fraudulent debtors; and hence it is pretty generally understood, that the courts not only give a liberal construction to the non imprisonment laws in favor of the debtor, but a most technical and stringent construction against the creditor. Time and commercial cupidity will soon bring about a more wholesome state of opinion.

For what causes issued, and how Allowed.

The statute¹ provides, that on any judgment or decree, the court, when in session, or any judge thereof, in vacation, may order a *capias ad satisfaciendum*, to be issued against the judgment debtor, on the application of the judgment creditor, or his lawful attorney, if such court or judge shall be satisfied, by the affidavit of such applicant, and such other testimony as he shall present, of the existence of either of the following particulars :

First : That the judgment debtor has removed, or is about to remove, any of his property out of the jurisdiction of the court, with intent to prevent the collection of the money due on the judgment or decree ; or

Second : That he has property, rights in action, evidences of debt, or some interest or stock in some corporation or company, which he fraudulently conceals, or unjustly refuses to apply to the payment of the judgment or decree : or

Third : That he has assigned or disposed of, or is about to assign or dispose of his property, or rights in action, with intent to defraud his creditors, or give an unfair preference to some of them : or

Fourth : That he has converted, or is about to convert his property into money, with intent to prevent its being taken on execution : or

Fifth : That he fraudulently contracted the debt, or incurred the obligation, on which the judgment or decree was rendered : or

Sixth : That he is about to remove his person out of the state or county, with intent thereby to defraud his creditors :² or

Seventh : That he is not a citizen or resident of this state : or

Eighth : That he has converted his property into money, for the purpose of placing it beyond the reach of his creditors.

There must be an affidavit of the applicant and other testimony. This testimony must be sufficient to satisfy the court or judge, of the existence of one of the particulars above mentioned.

The general rules before stated,³ as to what facts and circumstances should be stated for the purpose of procuring a *capias ad respondendum*, are equally applicable to affidavits to procure a *ca. sa.*⁴

So, the forms already given⁵ as respects the facts and circumstances to be stated in affidavits to procure a *capias ad respondendum*, where the affiants cannot swear positively to the particular required by the statute, are equally applicable to affidavits, upon an application for a *ca. sa.*

(i) Swan's Stat. 647, 648 649; 41 vol. Stat. 28.

(j) 41 vol. Stat. 28.

(k) Ante p. 131.

(l) In the case of *Hockspringer v. Blackenburg*, 16 Ohio Rep. 304, it was held, that if a creditor swear positively to the particular required to be established, in order to authorize the issuing of a *ca. ad respondendum*, it will be sufficient. The affidavit in that case, after stating the indebtedness, was as follows : "And

the said deponent further saith, that the said Hockspringer is about to dispose of his property with intent to defraud his, said Hockspringer's, creditors." It will be observed, that this was not an affidavit of simple belief, but of the positive existence of fact. An affidavit, stating that the deponent verily believes the particular to be true, is not probably sufficient, without a statement of facts which show *prima facie* that the particular believed is true. See ante p. 131.

(m) Ante p. 140 to 143.

Affidavit &c. for, and its Allowance.

Form of Precipe and Affidavit for a Capias ad Satisfaciendum.

— Common Pleas.

A. B. } Judgment [or Decree] of — Com. Pleas, rendered at —
 v. }
 C. D. } Term, A. D. —.

Issue a ca. sa. on above, as per allowance.

To Clerk — Com. Pleas.

L. S., Attorney for plaintiff.

[Date.]

The State of Ohio, — county, ss.

The above named A. B. maketh oath and says, that the above named C. D. is justly and truly indebted to this deponent in the sum of — [*Here state the amount of the judgment or decree and costs,*] upon and by virtue of a [judgment, or say decree] of said Court of Common Pleas of said county, whereby [this deponent] recovered against the said C. D. the said sums of money herein above mentioned, and which are due and unpaid, and said [judgment or decree] remains in full force and unsatisfied.

If the affidavit is made by the attorney of the plaintiff, say: — L. S. maketh oath and says that he is the lawful attorney of the said A. B., in the premises, and that the said C. D. is justly and truly indebted to the said A. B. in [*&c., proceeding as above.*]

This deponent further says, that [*Here state one of the particulars above mentioned for the allowance of a ca. sa., either positively, or that "the deponent has reason to believe, and does believe that," &c., and then set forth such facts and circumstances, threats, or declarations, as establish prima facie the particular; beginning the statement of the facts and circumstances thus:— And that the grounds of that belief are &c. See ante, p. 140 to 143.*]

The other testimony besides the affidavit of the applicant, may be either oral or by affidavit. If by affidavit, it may be entitled thus:

— Com. Pleas.

A. B. }
 v. } Judgment [or decree] of — Com. Pleas. Application for a ca. sa.
 C. D. }

The State of Ohio, — County, ss. S. S. maketh oath and says, [*&c.*]

The order of the judge allowing the ca. sa. to issue, should be indorsed on the præcipe or affidavit, and filed in the clerk's office with the præcipe.

It may be in the form following:

Form of Judge's Order for a Ca. Sa.

On application of [A. B., or say, L. S., the lawful attorney of A. B.] and

(n) This is the language of the Statute.

Order for Allowance, and Proceedings under.

I being satisfied by the affidavit of said applicant, and other testimony presented to me by him, that [*Here state the particulars in the terms of the statute as thus: C. D., [above or within named,] has converted his property into money with intent to prevent its being taken on execution,*] I do order a capias ad satisfaciendum to be issued against the said C. D. on the [*above or within*] mentioned [*judgment or decree.*]

M. M., Associate Judge of — Com. Pleas.

[*Date.*]

Form of Order of Court for a Ca. Sa.

A. B. } v. } C. D. }	Judgment, [<i>or decree,</i>] at — Term, A. D. — . Application for a Ca. Sa.
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On motion of the said A. B. [*or say, On motion of Mr. S., the lawful attorney of the said A. B.*] and it appearing to the satisfaction of the court by the affidavit of said A. B., and other testimony presented to the court by him, that [*Here state the particular as described above.*] It is ordered, that a capias ad satisfaciendum issue against the said C. D. on the above judgment [*or decree.*]

SEC. III. PROCEEDINGS OF THE OFFICER, &C., UNDER A CA. SA.

What has been already said as to the execution of a capias ad respondendum, is equally applicable to a ca. sa., and need not be repeated.^o

If the officer does not use due diligence in making the arrest, and unnecessarily delay it, he will be liable to suit, and the plaintiff will recover what he may have lost on account of the body of the defendant not being taken.^p

If the defendant delivers and sets off to the officer, sufficient property, real or personal, to satisfy the judgment and costs, he must be discharged.^q The property received in such case is treated by the officer as a levy, and sold accordingly.^r

If the defendant neither pays the amount of the execution, nor delivers or sets off property, he must be taken to the jail of the county. He cannot be confined elsewhere.^s The jail, the prison^t bounds, a habeas corpus, or the benefit of the insolvent law,^u are, in general, the only alternatives for the defendant. He cannot, as upon a capias ad respondendum, give a bail bond.

The officer, after the defendant is actually imprisoned,^v must allow him the privilege of the prison bounds, if he executes a bond, payable to the plaintiff,

(o) See ante, p. 146 to 150.

(p) 5 T. R. 40; 4 M. & W. 145.

(q) Swan's Stat. 483. And so when the ca. sa. is issued for a fine for an assault and battery. 2 Ohio Rep. 327.

(r) 2 Ohio Rep. 327.

(s) 2 Ohio Rep. 318.

(t) See ante, 159.

(u) See ante, 160.

(v) See ante, 159.

Bond for the Prison Limits.

with two or more sureties, residents of the county, such as two of the judges of the Court of Common Pleas, or justices of the peace shall approve, in double the amount for which the defendant stands committed, conditioned for his safe continuing in the custody of the jailor, within the limits of the prison bounds, until legally discharged.*

The prison bounds extend to the limits of the county.* If, after the prison bounds bond is executed, the limits of the county are changed, it does not alter the prison limits as to the defendant.*

A certificate of discharge under the insolvent law, discharges the sureties upon the bond, although the proceedings are afterwards dismissed, and the defendant remains within the prison limits.* And a discharge of the defendant in any manner, is a discharge of the sureties.* So, if the ca. sa. was void or was quashed, because issued without the order of a court or judge, as required by the non imprisonment act, the prison bounds bond can, on that account, be avoided.*

The bond may be in the form following :

Form of the Bond for the Prison Bounds.

Know all men by these presents, that we, C. D., E. F. and G. H., are held and bound to A. B., in the sum of, [*double the sum for which the prisoner stands committed*]; for the payment of which we jointly and severally bind ourselves. Sealed with our seals, and dated this — day of —, A. D. —.

The condition of this obligation is such, that whereas, on the — day of —, A. D. —, a ca. sa. issued from the Court of Common Pleas of — county, upon a judgment rendered by said court, at their — term A. D. —, against said C. D., at the suit of said A. B., for \$— debt, \$— damages, — costs; by virtue of which, the said C. D. was committed to, and is now imprisoned in the jail of said county: Now, if the said C. D. shall safely continue in the custody of the jailor of said county, within the limits of the prison bounds of said county, until legally discharged, then this obligation to be void, otherwise in full force.

C. D., [Seal.]

E. F., [Seal.]

G. H., [Seal.]

Attest, S. S.

We, the undersigned, justices of the peace in and for said county of —, do hereby approve of the above named E. F. and G. H., as good and sufficient sureties in the premises.

L. S., J. P.

T. J., J. P.

[Date.]

(w) Swan's Stat. 735.

(x) 10 Ohio Rep. 392.

(y) 9 Ohio Rep. 100.

(z) 10 Ohio Rep. 357; 3 Wend. 184; 4 Blackf. 190.

(a) 15 Ohio Rep. 272.

Escape — Jail Fees, &c. — Returns.

The bond is left with the sheriff until the plaintiff demands it. If there be two or more executions, bonds should be taken in each case.

A summary of the law relating to escapes, where the arrest is on a *capias ad respondendum*, has already been given,^c and the law relating to escapes in a *ca. sa.*, is at the same time alluded to.

The law, it will be observed, is very different in regard to the duty of the officer under the two writs. Upon a *ca. sa.*, the officer is bound to keep the defendant in custody in the jail, and if he voluntarily permit him to go at large, cannot retake him; but if the escape is negligent, the officer may retake the defendant.^c

If the escape is without the consent of the plaintiff, it seems that nothing but the act of God, or the enemies of the country, can excuse the sheriff.^d

If the plaintiff discharges the defendant, or one of several defendants from the arrest under a *ca. sa.*, the execution and the judgment are satisfied, and may be so entered;^e for the arrest was a satisfaction of the judgment, and consequently discharged the lien of the judgment on the lands of the defendant.^f

Where the writ is received from another county, the officer is not bound to execute it, unless, indorsed by the clerk who issued it, "funds are deposited to pay the sheriff on this writ;"^g and after the defendant is conveyed to the jail of the proper county^h from whence the writ issued, the clerk pays the fees.ⁱ

The plaintiff is, in the first instance, liable to the officer for the jail fees, and if required, weekly in advance. They are taxed as accruing costs against the defendant.^j

The forms of returns to a *ca. sa.* are, in general, the same as to a *capias ad respondendum*, except that no bail can be taken.^j

(b) 2 Ohio Rep. 277.

(c) Ante p. 158.

(d) 3 Blackf. 14; 4 Id. 193; 10 Mass. 206; 24 Wend. 381; 6 Ohio Rep. 13.

(e) 6 Blackf. 35; 5 Ib. 534; 4 Id. 201; 7 Cowen, :74.

(f) 11 Ohio Rep. 42; Wright's Rep. 447; 1 Cowen, 56.

(g) Swan's Stat. 402. For the fees in such case, see Id. 401.

(h) Id. 481, sec 25.

(i) Id. 649.

(j) See the forms of returns, ante, p. 151 to 153: Nos. 1, 3, 7, 9, 10, 11.

CHAPTER XXXIII.

PROCEEDINGS IN EJECTMENT AFTER JUDGMENT.

SECTION I. PROCEEDINGS ON A HABERE FACIAS POSSESSIONEM.

II. WRIT OF RESTITUTION.

III. OCCUPYING CLAIMANTS.

1. Who may have the benefit of the law for the relief of occupying claimants.
 2. The general relief to which the occupying claimant is entitled under the act of 1831.
 3. Mode of proceeding to obtain relief under the occupying claimant law of 1831, with forms.
 4. Proceedings under the amendatory act of 1849.
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SEC. I. PROCEEDINGS ON THE HABERE FACIAS POSSESSIONEM.

The form of the writ has been already given.^a

In executing the writ, the lessor of the plaintiff, in general, points out to the sheriff the premises demanded under the habere facias ; and the sheriff according to the direction of the lessor of the plaintiff, delivers possession.^b The lessor of the plaintiff and sheriff, in this, act at their peril.^c

When the verdict is special, and locates the premises, the lessor of the plaintiff and sheriff must be guided by it.^d

The execution of the writ is not complete, until the officer has given the lessor of the plaintiff or his agent possession ; and if there are several persons in possession, a delivery of the part held by each should be made.^e But if there be but one person in possession, and that person be removed, or submit, a delivery of part may be made in the name of the whole.^e Actual possession, however, should in general be given ; for, if persons be left in the premises, the execution is not complete. If possession of a house is to be given, the goods should be removed.

It seems, if the tenant, *immediately* after the officer has given possession to

(a) Ante p. 1018, 1019.

(c) Id. lb. ; 4 Dana 371 ; 6 Id. 226 ; 8 Id.

(b) Adams, Eject. 307 ; 2 J. J. Marsh. 389 ; 312 ; 5 Litt. 323 ;

(d) 3 Cowen 291.

5 Blackf. 143.

(e) Adams, Eject. 309 ; 5 Dana 378.

Habere Facias — Restitution.

the lessor of the plaintiff, ejects him, the sheriff may restore him, as the writ, in such case, was not fully executed.¹

It is held in New York, that if immediately, or soon after the officer has given possession to the plaintiff, the plaintiff is turned out by the defendant, or any one claiming under him, a new writ may issue before the return day of the first, but not if the plaintiff is turned out by a stranger.² But it may be doubted whether, after the habere facias has been executed, and the officer has put the plaintiff in full possession and entire control of the premises, the plaintiff has any other remedy, if dispossessed, than an action of forcible entry and detainer, or another action of ejectment.³

The sheriff has a right to break open doors to execute the writ.⁴

After the demise laid in the declaration has expired, a habere facias cannot issue;⁵ and the demise cannot be extended after judgment.⁶

A defendant in ejectment cannot in general, transfer his possession, so as to defeat the service of the habere facias; nor, it seems, would even a sale on judgment and execution against him, protect the purchaser in his possession, against the habere facias.⁷

SEC. II. WRIT OF RESTITUTION.

We have already seen that the sheriff delivers possession on a habere facias, according to the directions of the lessor of the plaintiff. If possession is taken of more land or other land than was recovered, the court will order restitution of such part as was not included in the verdict and judgment.⁸

So, where a judgment by default, or other judgment in ejectment, which has been carried into effect under a habere facias, is afterwards set aside for irregularity, or fraud, or surprise, or otherwise avoided by the judgment of the court, or if parties have been ousted by an illegal execution, the court will award restitution.⁹

The writ of restitution issued in such cases, is usually in the form following:

Writ of Restitution.

The State of Ohio, — County, ss:

To the sheriff of said County, Greeting:

Whereas by our writ reciting, That whereas *John Doe* on the — day of — A. D. in our Court of Common Pleas within and for the said county

(f) Adams, Eject. 309; Watson on Shffs. 216.

(g) 11 Wend. 182.

(h) See 5 Ohio Rep. 509; 2 Dana 52; 7 J. J. Marsh. 42; 1 Taunt 55; 3 Pennsylv. 228.

(i) 4 Blackf. 18.

(j) 3 A. K. Marsh. 392; 2 Bibb. 148.

(k) 2 Dana 57.

(l) 9 Cowen 233.

(m) 5 Cowen 418; 5 Johns. 366.

(n) 4 Dana 371; 8 Id. 312; 2 Id. 52; 2 J. J.

Marsh. 388; 3 Id. 5; 7 Id. 628, 635; 3 Bibb. 314; 6 Dana 226; 3 Halst. 161; 1 Id. 431; 3 Marsh. 393, 521; 1 Monr. 15; 3 Id. 51; 5 Id. 542, 1 Lit. 237; 5 Id. 304; Peters C. C. Rep. 444; 7 Halst. 321.

Who may have Relief as such.

of —, recovered against *John Smith*, his term yet to come in [*two messuages, &c., as in the habere facias,*] situate in your bailiwick, which John Rogers had demised to said John Doe for a term not yet ended, we lately commanded you, that you should cause the said John Doe to have his possession of his term aforesaid yet to come, in the tenements aforesaid with the appurtenances, and how you should execute that our writ you should make appear to the Judges of our said Court of Common Pleas, on the first day of their next term; by virtue of which writ you caused the said John Doe to have possession of his term aforesaid in the tenements aforesaid, as by your return thereof appears: and because that writ did wrongfully, unadvisedly and erroneously, issue out of our said Court of Common Pleas; Therefore we command you, that without delay you restore to the said Joseph Smith his full possession of said tenements, with the appurtenances, from him so unjustly taken as aforesaid: and how you shall execute this writ, make appear to the Judges of our said Court of Common Pleas, on the first day of their next term; and have you then there this writ.

Witness F. C., Clerk of our said Court of Common Pleas, at C., this — day of —, A. D. —.

F. C., Clerk.

SEC. III. OCCUPYING CLAIMANTS.

The act of March 10, 1831,^a relating to occupying claimants, has been materially modified by the act of March 22, 1849,^p which gives the occupying claimant the right to choose whether he will demand pay for his improvements, or take the land and pay the successful claimant its value. As there are numerous cases pending under the old law to which the recent law cannot be applied, and a construction has not yet been given to the act of 1849, I shall in the first place, give the proceedings under the act of 1831, as if the act of 1849 had not been passed; and then point out the mode of proceeding under the last mentioned statute. Indeed, it may be doubted whether any part of the law of 1831 has been entirely abrogated by the act of 1849.

1. *Who may have the benefit of the Law for the relief of occupying Claimants.*

In many cases the defendant in ejectment, being defeated by an adverse and better title, would, at common law, be compelled to yield up possession and lose entirely the improvements made on the land. To prevent such injustice, the statute for the relief of occupying claimants was passed.^q This statute does

(a) Swan's Stat. 605.

(p) 47 vol. Stat. 56.

(q) Swan's Stat. 605.

Who may have Relief as such.

not provide for the payment of improvements made by a mere intruder who neither has nor derives his claim from a paper title. Nor does the statute interpose for the benefit of a claimant who is not in the quiet possession of the land.

If the defendant in ejectment is defeated by an adverse and better title, and was in the quiet possession of the premises, he may proceed under the occupying claimant law, to obtain an adjustment and compensation for lasting and valuable improvements, provided he can show either :

1. A plain and connected title in law or equity, derived from the records of some public office. Thus : a lease of a school section, made by the trustees of the township, and recorded by the clerk of the township, is deemed a title recorded in a public office.' Or,

2. That he holds the land by deed, devise, descent, contract, bond or agreement, from or under a person claiming title, in law or equity, derived from the records of some public office, or by deed duly authenticated and recorded : or,

3. That he holds the land under sale, on execution against a person claiming title in law or equity, derived from the records of some public office, or by deed duly authenticated and recorded : Thus, if a purchaser upon an execution against A. is evicted by another purchaser upon another execution against A., the former may have the benefit of the occupying claimant law.' But a purchaser from the judgment debtor at private sale, while the land is under levy and bound by the judgment, is not entitled to relief under this act, when evicted by a purchaser under the judgment :' Or,

4. That he holds the same under a sale for taxes, authorized by the laws of this State, or the laws of the Territory north west of the river Ohio. Lest this title should not be deemed adverse, the statute provides* that the title by which the plaintiff in ejectment succeeds, in all cases of land sold for taxes by virtue of the above mentioned tax laws, shall be considered as an adverse and better title, whether it be the title under which the taxes were due, and for which the land was sold, or any other title or claim whatsoever ; and the occupying claimant holding possession of land sold for taxes as aforesaid, having the deed of a collector of taxes or county auditor, for such sale for taxes, or a certificate of sale of the land from a collector of taxes or a county treasurer, or shall claim under a person who holds such deed or certificate, shall be considered as having sufficient title to the land to demand the value of improvements under the occupying claimant law : Or,

5. That he claims title and holds the land under a sale and conveyance made by executors, administrators, or guardians, or by any other person or persons, in pursuance of any order of court, or decree in chancery, where lands are or have been directed to be sold, and the purchaser thereof has obtained title to, and possession of the same, without any fraud or collusion on his part.

(r) 6 Ohio Rep. 538.

(s) 5 Ohio Rep. 398.

(t) 7 Ohio Rep. (part 2,) 188.

(u) Swan's Stat. 606 § 2.

Their Remedy under the Act of 1831.

Of course, the purchaser at an administrator's sale, who is evicted by the heir, is entitled to relief under this act.^v

A purchaser under a void sale, made in pursuance of a decree in another State, is entitled to the benefit of the occupying claimant law.^w

A defendant, failing in ejectment on the ground that the land improved by him is without the bounds of his title deed, is not entitled to recover the value of his improvements under this act.^x

2. *The general relief to which the Occupying Claimant is entitled, under the Act of 1831.*

An estimate is had, as well of all the lasting and valuable improvements, made previous to the defendant receiving actual notice of the adverse claim, as of the damages, if any, which the land has sustained by waste. An estimate is also made, of the net annual value of the rents and profits, which the occupying claimant may have received from the land, after having notice of the plaintiff's title by the service of a declaration in ejectment. An estimate is also made of the value of the land at the time the judgment in the action of ejectment was rendered, without the improvements made thereon or damages sustained by waste.^y

If the waste and rents, as estimated, exceed the value of the lasting and valuable improvements, judgment is rendered in favor of the plaintiff in ejectment against the occupying claimant, for such excess, together with costs, and execution may be issued therefor, as upon other judgments. In such case, or where no such excess is found from the estimate, then, and in either case, the plaintiff in ejectment will be barred from having or maintaining any action for mesne profits.^z

If, however, the lasting and valuable improvements exceed the waste and rents, estimated as above mentioned, then the lessor of the plaintiff in ejectment, his heirs, or the guardian of such heirs, if minors, may either demand of the occupying claimant the assessed value of the land without the improvements, and tender a deed to the occupying claimant, or, take the land and pay the occupying claimant for the improvements as assessed, after deducting the damages for waste and the assessed rents, within such reasonable time as the court may allow.^a

Upon such election, the court determine the time when the money is to be paid by the occupying claimant or by the successful claimant, and the money to be paid by either, is generally deposited with the court, or rather, the clerk of the court, for the other party.^b

(v) 6 Ohio Rep. 1.

(w) 13 Ohio Rep. 368.

(x) 15 Ohio Rep. 13.

(y) Swan's Stat. 607, § 4.

(z) Swan's Stat. 608 § 7.

(a) Id. 608, § 8.

(b) Id., § 8, 10, 11.

Proceedings under the Act of 1831—The Application.

If the plaintiff in ejectment, his heirs, or the guardian of his minor heirs, elect to take the land and pay the occupying claimant, as above mentioned, the court make an order, fixing the time of payment, and if the money is paid within that time, a writ of possession is issued, upon the judgment in the action of ejectment.^c

But if the successful party in the action of ejectment elect to take the value of the land without improvements, as above mentioned, the court make an order fixing the time of payment; and the successful party in the action of ejectment must within that time, tender to the occupying claimant, a general warranty deed for the land, either from himself or other person holding the title;^d and if the occupying claimant neglects or refuses to pay the money within the time limited, then a writ of possession will be issued upon the judgment in ejectment.^e But if the money is paid into court, by the occupying claimant, he, or his heirs may, at any time afterwards, file a bill in chancery in the court where such judgment in ejectment was obtained, and perfect the title.^f

The occupying claimant is entitled to pay for improvements made before, as well as after his title commenced.^g He cannot claim interest on the valuation between the time of the assessment and the election.^h

3. *Mode of proceeding to obtain relief under the Occupying Claimant law, of 1831, with forms.*

Upon the rendition of the judgment in ejectment against the occupying claimant, the court, at the request of either party, will cause a journal entry to be made of the application, under the act for the relief of occupying claimants of land.ⁱ This journal entry is the first step in the proceedings under this law, and these proceedings are deemed separate from the action of ejectment.^j Hence the journal entry should show by whom the application is made.

The form of the journal entry may be as follows :

Form of the first Journal Entry of the Application for Relief.

Immediately after the judgment in ejectment add the following:— And thereupon the said C. D., by S. S., his attorney, made application to the court for the valuation of improvements and assessment of damages, under the statute for the relief of occupying claimants; and the court having considered of the same, are of the opinion that he is entitled thereto; whereupon, it is ordered, that further proceedings may be had in the premises, agreeably to the provisions of said statute.^k Continued.

(c) Swan's Stat. 608, §9.

(d) 15 Ohio Rep. 285.

(e) Swan's Stat. 608, § 10, 11.

(f) 2 Ohio Rep. 237; 13 Ohio Rep. 308.

(g) 15 Ohio Rep. 285.

(h) Swan's Stat. 607, § 3.

(i) 1 Ohio Rep. 156; 11 Ohio Rep. 35.

Drawing the Jury — Issuing the Order for Assessments.

If the journal entry of the application is made separate from the judgment in ejectment, it may be in the form following :

<p>A. B. [the name of the occupying claimant,]</p> <p style="text-align: center;">v.</p> <p>C. D. [the name of the lessor of the plaintiff in ejectment.]</p>	}	<p>Application for relief under the occupying claimant law.</p>
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This day came the said A. B. by L. S., his attorney, and made application to the court for the valuation of improvements and assessment of damages under the statute for the relief of occupying claimants, upon certain lands in controversy, in a certain action of ejectment brought by the said C. D., as lessor of *John Doe*, heretofore pending in this court, and in which judgment has been rendered at the present term against the said A. B. And the court, now here, having considered of said application, are of the opinion that the said A. B. is entitled to relief in that behalf: Whereupon it is ordered, that further proceedings may be had in the premises, agreeably to the provisions of said statute.* Continued.

The next step, is the drawing a jury.

Either party may make the application for a jury, by requesting the clerk of the court and the sheriff to meet and draw a jury to assess the improvements, &c.

For this purpose, the party who desires further proceedings upon the order of the court allowing the application, can serve the clerk and sheriff each, with a notice in the form following:

<p>A. B. [<i>the occupying claimant</i>,]</p> <p style="text-align: center;">v.</p> <p>C. D. [<i>the real plaintiff in ejectment</i>.]</p>	}	<p>Application for relief under the oc- cupying claimant law.</p>
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To E. F., Clerk of Common Pleas, and G. H., Sheriff of — county.

You are hereby required, forthwith, to meet and draw a jury in the manner required by law, to act upon the above mentioned application for relief under the occupying claimant laws, that an order may issue accordingly.

[Signed, &c.]

[Date.]

The sheriff and clerk meet and draw from the box a jury of twelve men, of the jurymen returned to serve as such for the proper county, in the same manner as they are required by law to draw a jury in other cases.^a

The clerk will, without præcipe or further order, immediately issue an order to the sheriff, under the seal of the court, setting forth the names of the jury, and the duty to be performed under the statute.^b

The order issued by the clerk may be in the form following :

(h) Swan's Stat., 607, § 3.

Order to the Sheriff—Notice of Assessments.

Order to the Sheriff for Valuation of Improvements, &c.

The State of Ohio, — county, ss.

[Seal.]

To the Sheriff of — county, Greeting:

Whereas, on the — day of —, A. D. —, the lessor of A. B. recovered a judgment against C. D. in a certain action of ejectment lately pending in our Court of Common Pleas, within and for the said county of —, for his term yet to come in the following lands and tenements, to wit: [*Here describe the lands as in the declaration in ejectment, or, as in the judgment, when the lands are described in the judgment,*] and whereas, also, upon the rendition of said judgment, our said Court of Common Pleas, on application for that purpose, granted to the said C. D. the benefits of the statute for the relief of occupying claimants: We therefore command you, that without delay, by the oaths of E. F., [&c., *Names of Jurors,*] and upon actual view of the premises, you cause to be made a just and true assessment of the value of all lasting and valuable improvements made upon the lands and tenements aforesaid, by the said C. D. or by any person or persons under whom the said C. D. holds the same, previous to the — day of —, A. D. —, [*Date of the service of the declaration in ejectment,*] and also, that, in like manner, you cause to be made a just and true assessment of the damages, if any, which the said lands and tenements may have sustained by waste, together with the net annual value of the rents and profits which the said C. D. may have received from the same, from and after the — day of —, [*Date of the service of the declaration in ejectment,*] deducting the amount of such rents and profits from the estimated value of the lasting and valuable improvements aforesaid; and also that, in like manner, you cause to be made, a just and true assessment of the value of the said lands and tenements, on the — day of —, A. D. [*Date of the final judgment in ejectment,*] exclusive of the improvements made thereon, and the damages sustained by waste as aforesaid: and of this writ make legal service and due return.

Witness, F. C., Clerk of our said Court of Common Pleas, at C., this — day of —, A. D. —.

F. C., Clerk.

The party making the application for the drawing of the jury must give notice to the opposite party, of the time when the assessment will be made. If the opposite party be a non-resident, notice to his attorney will be sufficient.¹

Empanelling, Challenging and Swearing the Jury.

Form of Notice.

John Doe ex dem. A. B. }
 v. } — Common Pleas. Application for val-
 John Smith. } uation of improvements, &c.

To A. B. or S. T., his Attorney.

You are hereby notified, that on — the sheriff, at my instance, will proceed to execute the order for the valuation of improvements, &c., granted herein at the last term of said court.

JOHN SMITH.

Dated, &c.

The sheriff must notify the jury named in the order or writ, to attend.¹

If any juror named in the order or writ is absent from the county, or is of kin to either party, or is from any other cause disqualified or unable to serve on the jury, the sheriff may summon talesmen, as in other cases, who serve in the same manner as if originally drawn and named in the order.² The statute is silent as to the tribunal which shall decide whether a juror is disqualified to serve; but it was no doubt the intention, that the sheriff should do it. The peremptory challenge of two jurors by each party, without assigning any sufficient cause, could not, of course, be allowed. But if a juror has made up and expressed an opinion, or is otherwise disqualified, the sheriff should reject him.¹

After the panel is made up, a justice of the peace, or other officer authorized to administer oaths, will administer an oath or affirmation to the jury. A certificate of such oath may be annexed to the return of the jury, in the form following:

Form of Certificate of the Jury having been sworn.

The State of Ohio, — county, ss.

Be it rememered, that on the — day of —, A. D. 18 —, before me, a justice of the peace in and for said county, personally appeared, the jury within named, and before proceeding to view and make the assessment, &c. therein certified, and were duly sworn by me to make a true and just assessment in the premises, under the application and order of the court therein referred to. In witness whereof, I have hereunto set my hand this — day of —, in the year above mentioned.

G. L., Justice Peace in and for said county.

The jury then proceed to view the premises, and make out, sign and seal four schedules,³ which may be in the form following:

(j) Swan's Stat. 607, § 4.

(k) Ib. 607, § 5.

(l) For causes of challenge, see ante p. 891, 892.

(m) Swan's Stat. 607, § 6.

Form of the Schedules of the Jury.

Form of Assessment for Improvements.

We, the jury, duly empanelled under the within writ, having been first duly sworn, upon actual view of the premises in the within writ described, do make the assessment of the value of all lasting and valuable improvements made on said land previous to the — day of —, A. D. —, [*the date of the service of the declaration in ejectment*] as well by said A. B. [*the name of the occupying claimant,*] as by the persons under whom the said A. B. held the same, which are as follows, to wit :

One stone dwelling house, which, with the fixtures, we estimate at two thousand dollars-----	2,000
One frame barn, estimated by us at four hundred dollars-----	400
One corn crib, estimated by us at twenty dollars-----	20
One well with fixtures, estimated by us at thirty-five dollars-----	35
Clearing fifty acres of said land and fencing the same, estimated by us at five hundred dollars-----	500
One orchard, containing two hundred apple trees, estimated by us at two hundred and fifty dollars-----	250
	<hr/> 3,205

Making the whole amount of said lasting and valuable improvements upon said premises, assessed by us, and liable to be assessed, as aforesaid, three thousand two hundred and five dollars ; and deducting therefrom the sum of two hundred and fifty dollars (being the amount of the rents and profits of said land, estimated by us, as will more fully appear by the estimate herewith returned,) leaves the sum of *two thousand nine hundred and fifty-five* dollars excess in favor of the occupying claimant.

[*Signed and sealed by each juror.*]

[*Date.*]

Form of Assessment of Waste.

We, the said jury named in the within writ, having been first duly sworn, upon actual view of the premises, in the within writ described, do also assess the damages, which said land has sustained by waste, as follows, to wit :

By cutting down valuable timber thereon, which waste we estimate at two hundred dollars-----	200
By digging two large pits in the soil, which waste we estimate at one hundred dollars-----	100

Making the whole amount of damages which said land has sustained by waste, three hundred dollars.

[*Signed and sealed by each juror.*]

[*Date.*]

Form of Assessment of the Rents and Profits.

We the jury named in the within writ, having been first duly sworn, upon actual view of the premises in the within writ described, do estimate the net annual value of the rents and profits which the said A. B. [*the occupying claimant*] may have received from the same, since the — day of —, A. D. —, [*date of the service of the declaration in ejectment being the date as stated in the writ,*] at two hundred dollars, which to this date (*one year and three months*) amounts to two hundred and fifty dollars. (\$250.)

[Signed and sealed by each juror.]

[Date.]

Form of Assessment of the value of the Land.

We the jury named in the within writ, having been first duly sworn, upon actual view of the premises in the within writ described, do estimate the value of said land on the — day of —, A. D. —, [*date of the final judgment in ejectment,*] at four thousand dollars, exclusive of the said improvements and damages for waste herein under this writ by us estimated.

[Signed and sealed by each juror.]

[Date.]

These several schedules of estimates may be written out on the same sheet or annexed together, and the whole annexed to the writ.

The sheriff will then indorse on the writ his return, which may be in the form following:

Form of the Return of the Sheriff.

May 6, 1858. I served this writ upon the jurors within named, by notifying them thereof, &c., and the execution of the same appears in certain schedules hereto annexed.

Fees:

S. W., Sheriff of — county.

[Date.]

Another Form of the Return of the Sheriff, where Talesmen are summoned.

May 6, 1858. I served this writ upon the following jurors within named, to wit: [*Here name the jurors served.*] The following jurors within named are absent from the county, to wit: A. A. and T. S. On the — day of —, A. D. —, the said jurors first named, and who were served with this writ, appeared upon the premises within described, except L. M., who was unable to attend on account of sickness. Thereupon I summoned R. S., L. S. and H. S., three judicious persons, residents of said — county, having the qualifications of electors, talesmen in the place of said A. A. and T. S.

Filing Schedules — Setting aside Assessments.

who remain absent from the county, and L. M., who is sick, to serve on said jury. They appeared at the time and place aforesaid; and the parties to these proceedings being also present, and said jury so made up and empanelled, the within named A. B. objected to the said M. M., and challenged him as a juror, on the ground that he was akin to the said C. D., and I being satisfied that the said M. M. is so of kin and disqualified as a juror, he was excluded from said panel, and X. X., a resident of said county, having the qualifications of an elector, was summoned by me as a talesman in the place of said M. M., and appeared and was empanelled; and thereupon the said jury so made up and empanelled, was duly sworn, &c., by J. S., a justice of the peace in and for said county, and with the said jury I proceeded to and did then execute this writ, as will appear by certain schedules hereto annexed.

Fees:

S. W., Sheriff of — county.

[Date.]

The schedules signed and sealed by the jury being annexed to the writ, and the return of the sheriff being indorsed on the writ, the whole may be deposited with the clerk by the jury, inasmuch as the statute provides, "that the jury shall sign and seal their respective assessments and valuations aforesaid, and deposit the same with the clerk of the court by whom they were appointed, before the first day of the next term of the said court after said order is made." It would seem from this provision of the statute, that no return by the sheriff was contemplated.

If either party thinks himself aggrieved by the assessment or valuation, he may apply to the court at the term to which the proceedings are returned; and the court may, upon good cause shown, set aside such assessment and order a new valuation, and appoint another jury as hereinbefore mentioned, who proceed in like manner as before mentioned.^m

Form of Motion to set aside Assessment.

A. B. }
v. } Application for relief under the Occupying Claimant Law.
C. D. }

The assessment of the jury under the order of the court heretofore made, having been returned to this term, the said A. B., by Mr. S. S., his attorney, now comes and moves the court to set aside said assessment on the following grounds, to wit: [*Here state the grounds for setting aside the assessment.*]

Form of Order setting aside the Assessment.

A. B. }
v. } Motion to set aside Assessment made under the Occupying
C. D. } Claimant Law.

This day came the said A. B. by S. S., his attorney, and the said C. D., by

(l) Swan's Stat. 607, §6.

(m) Swan's Stat. 607, §6.

Judgment on the Assessments.

H. H., his attorney, and the motion herein before made to set aside the assessment of the jury, came on to be heard upon the affidavits and proofs filed herein. [*If either party desires to review the decision of the Court of Common Pleas, here add the following:* and which said affidavits and proofs were as follows: [*setting out the testimony,*] and which were all the affidavits and proofs adduced on both sides.] And the court having fully considered the same, are of the opinion that good cause is shown for setting aside said assessments on the ground, [*&c., stating the ground of objection sustained by the court,*] the court do therefore order said assessments, and the proceedings of the jury and sheriff in the premises, to be and the same are hereby set aside; and the court do further order, that another valuation of improvements and assessment of damages be had in the premises, agreeably to the provisions of the act for the relief of occupying claimants, and that the same be returned to our next term, to which time this cause is continued.^a

Form of Order and Judgment where the Waste and Rents exceed the value of the Improvements.

A. B. }
v. } Proceedings for relief under the Occupying Claimant Law.
C. D. }

This day came the said parties by their attorneys, and the jury having made return of their assessments and valuation in the premises, and no good cause being shown against the same, the said assessments and valuation, are, on motion of the said A. B., confirmed by the court. And the said jury having reported the sum of — dollars — cents in favor of the said C. D., [*the name of the lessor of the plaintiff in ejectment,*] on the assessment and valuation of the valuable and lasting improvements, and the assessment of damages for waste and the net annual value of the rents and profits, it is therefore considered by the court, that the said C. D. recover of the said A. B. [*the name of the occupying claimant,*] the said sum of — dollars — cents, and his costs herein taxed to — dollars — cents.

Form of Order and Judgment when the successful Claimant elects to take the value of the Land.

A. B. }
v. } Proceedings for Relief under the Occupying Claimant Law.^o
C. D. }

This day came the said parties, by their attorneys, and the jury having made return of their assessments and valuation in the premises, and no good cause being shown against the same, the said assessments and valuation are, on motion of the said A. B., confirmed by the court. And the said jury having reported a sum in favor of the said A. B., [*the name of the occupying claimant,*] on the lasting and valuable improvements, [after deducting from the

(n) Swan's Stat. 607, §6.

(o) Swan's Stat. 608, secs. 8, 10, 11.

Judgment on the Assessments.

whole value of said improvements all damages for waste and the net rents and profits,] *the said C. D., now here in court, elects to take the value of said land without the improvements, assessed by said jury at — dollars — cents, and to surrender said land to the said A. B.; and* thereupon came the said C. D. and tendered to the said A. B. a general warrantee deed for said land, and which said deed is now here filed in court.^p And the court, on motion of the said C. D., do order the said A. B. to pay into the hands of the clerk of this court, for said C. D., said sum of — dollars — cents, within the time following, to wit, [*here state the time allowed by court for payments,*] and upon full payment thereof, the clerk is ordered to deliver said deed to said A. B.; and in default of such payment within the time aforesaid, the said deed shall be delivered up to the said C. D. to be cancelled, and the said C. D., upon præcipe filed for that purpose, shall have his execution on the judgment in ejectment upon which these proceedings are founded: And it is further considered by the court, that the said A. B. recover of the said C. D. his costs herein taxed at — dollars — cents.

Form of Order and Judgment when the successful Claimant elects to take the Land.

A. B. }
v. } Proceedings for Relief under the Occupying Claimant Laws.
C. D. }

This day came the said parties, by their attorneys, and the jury having made return of their assessments and valuation in the premises, and no good cause being shown against the same, on motion of the said —, the said assessments and valuation are confirmed. And the said jury having reported the sum of — dollars — cents in favor of the said A. B., on the assessments and valuation aforesaid, after deducting [*if damages for waste were allowed say,* damages for waste and] net annual profits, as required by law,* the said C. D., now here in Court, elects to take the said land, and to pay the said A. B. said sum of — dollars — cents, so allowed by said jury in favor of said A. B.; and* the court, on motion of the said —, do order the said C. D. to pay into the hands of the clerk of this court, for the said A. B., said sum of money last mentioned, within the time following, to wit, [*here state the time allowed by the court for payment.*] And upon full payment thereof within the times respectively aforesaid, the said C. D., upon præcipe filed for that purpose, shall have his execution on the judgment in ejectment upon which these proceedings are founded; but in default of such payment, all proceedings upon said judgment in ejectment are perpetually stayed. And it is further considered by the court, that the said A. B. recover of the said C. D., his costs herein taxed at — dollars — cents.

(p) See ante p. 1070: as to the time when the deed may be tendered.

4. Proceedings under the Amendatory Act of 1849.

By this act,⁴ passed March 22, 1849, it is provided "that the occupying claimant of land, holding by any such title or in such manner as is pointed out in the act for the relief of occupying claimants of land, passed March 10, 1831, of which this is amendatory, shall, after judgment rendered against him and in favor of the successful claimant, have an option to demand payment from said successful claimant of the full value of his lasting and valuable improvements made on the land in controversy, before the commencement of the suit, or to pay to the successful claimant the value of the land without the improvements made thereon, at his discretion.

"That if said occupying claimant shall elect to retain the land, he may tender to the successful claimant a sum of money equal to the value of the land in a state of nature, or if he shall elect to receive payment for his improvements, the successful claimant may tender to him a sum of money equal to the value of his improvements, but if such tender shall in either case be refused, unless the jury empanelled under the provisions of the third section of said before mentioned act, shall assess a larger sum in favor of the party so refusing than the amount tendered, exclusive of interest from the time of the tender, the party refusing shall pay the full costs of the proceeding. But if the jury shall assess a greater sum than the amount so tendered, exclusive of interest, then the party making the insufficient tender shall pay the costs, for which, if necessary, judgment may be rendered and execution issued as in other cases.

"Husbands may act on behalf of their wives, and guardians on behalf of their wards, under the provisions of this act; and all the provisions of said act, of which this is amendatory, shall remain in full force, except so far as they are modified or changed by this act."

Under the act of 1831, the successful claimant not only has the right of election, but this election is not made until after the assessments of the jury are returned to the court. Under this amendatory act, however, the occupying claimant, if he elects at all, does so before any proceedings are had under his application, and at the time it is allowed.

The election of the occupying claimant may be entered at the end of preceding form, on page 1070, at the star, thus, if he elect to pay for the land:

And thereupon the said C. D., now here in open court, elects to retain said land, and to pay to the said — the value of the same, without the improvements, and according to the statute in such case made and provided.

Or, if the occupying claimant elect to receive pay for his improvements, thus:

And thereupon the said C. D., now here in open court, elects to take and receive, and demands from the said —, payment of the full value of the

Proceedings under the Act of 1849.

lasting and valuable improvements made on the said premises, recovered as aforesaid, according to the statute in such case made and provided.

If the occupying claimant proceeds to have the value of the land and improvements assessed by a jury, without making any previous election, it will, perhaps, be held to be a waiver of his right of election, and the successful claimant may, in such case, elect under the law of 1831.

The forms of the final orders and judgments, when the occupying claimant elects to retain the land, or to take pay for his improvements, can be readily made out from the forms already given, omitting what is within the stars in those forms, and inserting the proper amounts and names of the parties.

(r) Ante, p. 1077, 1078.

CHAPTER XXXIV.

AMERCEMENT OF THE SHERIFF.

SECTION I. FOR WHAT THE SHERIFF MAY BE AMERCED.

II. THE AMOUNT FOR WHICH A SHERIFF MAY BE AMERCED.

III. PROCEEDINGS ON AMERCEMENT.

SEC. I. FOR WHAT THE SHERIFF MAY BE AMERCED.

We have already seen* under what circumstances the sheriff may be amerced for not bringing in the body of a defendant taken on a *capias ad respondendum*, and the mode of proceeding in such case.

The sheriff may also be amerced upon his neglect or refusal to perform his duty in either of the following particulars, namely:

First, If he refuse or neglect to execute any writ of execution to him directed, and which hath come to his hand.

Second, If he neglect or refuse to sell any goods and chattels, lands and tenements.

Third, If he neglect to call an inquest to appraise lands and tenements levied upon, according to the provisions of the law, and to return a copy thereof, forthwith, to the clerk's office.

Fourth, If he neglect to return any writ or writs of execution to him directed, to the court to which the same is or are returnable, on or before the second day of the term, if they are made returnable thereto, or on or before the time they are by law returnable.^b

Fifth, If he neglect to return a just and perfect inventory of all and singular the goods and chattels by him taken in execution, unless he returns that he hath levied and made the amount of the debt, damages, and costs.

Sixth, If he refuse or neglect, on demand, to pay over to the plaintiff, his agent, or attorney of record, all moneys by him collected or received, for the use of said party, at any time after collecting or receiving the same; unless the same is made by sale of real estate, in which case the sheriff may retain the purchase money in his hands until the court shall have examined and confirmed his proceedings in making the sale, upon which confirmation being made, he shall pay the same over to the person entitled thereto, agreeably to the or-

(a) Ante, p. 161.

(b) Swan's Stat. 483, 484; see ante, p. 1022 as to the time executions should be returned.

For what he may be Amerced.

der of the court. A neglect or refusal to pay in the latter case, after confirmation, upon demand, would be cause for amercement.

Seventh, If he neglect or refuse, on demand made for that purpose, by the defendant, or his legal agent, or attorney of record, to pay over all moneys by him received for any sale made on execution, more than sufficient to satisfy the writ or writs of execution, with interest and legal costs.^c

Eighth, If an injunction issues to stay proceedings upon an execution, under which he has received the whole or any part of the money collectable thereon, and he fails or refuses on demand made by the person against whom the execution issued, his executors, administrators, or attorney of record, to pay over the money so received, or such part thereof as may be enjoined, after retaining sufficient to pay the costs to be collected by the execution. In such a case, the court or judge may order the money, so made on execution, to be paid into court, or retained in the hands of the officer, until the injunction shall be dissolved or made perpetual. Such order must be obeyed by the officer, and obedience thereto will protect him from amercement.^d

Ninth, If he neglect or refuse to execute and return any subpoena or attachment, directed and delivered to him by any judicial or other officer, to enforce the attendance of a witness, whose deposition is required in any civil cause or matter, pending in any of the courts of the state.^e

Tenth, If he fail to return any summons, *capias ad respondendum*, or other process, to him directed, at the time and place therein mentioned, unless he can make it appear to the satisfaction of the court, that he was prevented by inevitable accident from so doing.^f

Where a summons or *capias ad respondendum* issues from a court to a sheriff of another county, in which one or more of several joint, or joint and several, debtors reside, he is liable to amercement in like manner as if it issued from the court of his own county.^g And when a judgment or decree is rendered in one county, and the defendant shall remove into, or be residing in, any other county, or shall have property in any other county, so that execution is issued thereon, directed to such other county, if the officer of such other county, to whom such execution is directed and delivered, shall neglect or refuse to execute and return the same to the office from whence it issued, according to the command thereof, or to pay over any money made thereon, the court from which such process issued, may amerce him in the same manner as though he were an officer of their own proper county.^h

If such writ from another county be a ca. sa., the sheriff, as we have already seen, need not execute it unless indorsed: "Funds are deposited to pay the sheriff on this writ;"ⁱ and the officer cannot be amerced for not executing such writ if the indorsement is omitted, although the funds were, in fact, deposited.^j

(c) Swan's Stat. 483, 484.

(d) Ibid, 712.

(e) Ibid, 323, 324.

(f) Swan's Stat. 649, 650.

(g) Ibid, 652.

(h) Ibid, 657.

(i) Ante, p. 1064.

(j) 10 Ohio Rep. 45.

For what he may be Amerced — Amount.

So, if the printer's fees have not been advanced, the sheriff will not be liable to an amercement for not advertising, or for omitting to do any act which could not be properly done without such advertisement.

Where an execution is received from another county, if the officer can show that, after discharging his duties under it, he inclosed it by mail to the clerk of the court who issued it, and that it was mailed a sufficient or reasonable time to have enabled it to reach the clerk within the time prescribed for its return, the officer will not be liable to amercement or otherwise, for any failure of the safe arrival of the execution.²

Demand of moneys collected on execution, must be made by the party entitled thereto, before the officer can be amerced for their non payment; and this demand must, unless admitted, be proved on the trial of the amercement. A demand made before the return of the writ is insufficient; and where the moneys arise from the sale of real estate, the demand cannot be made until the confirmation of the sale.

The causes for amercement are not extended by construction, inasmuch as the law is a penal one, and a party, to render the sheriff liable to this summary proceeding, must bring his facts within the letter and spirit of the law.² Thus, if the return of the sheriff shows, on its face, a due and faithful discharge of duty, although false, the party's remedy is by action at common law, and not a motion to amerce.²

The officer, however, cannot excuse himself for neglect or refusal to obey the command of the writ, on account of defects in the judgment, or irregularities in issuing the execution, unless such defects or irregularities render the writ void.²

SEC. II. THE AMOUNT FOR WHICH THE SHERIFF MAY BE AMERCED.

Under the first, second, third, fourth and fifth causes of amercement mentioned in the preceding section, the officer is amerced in the amount of the judgment remaining unpaid, the interest that has accrued, the costs, and ten per centum on the whole amount so made up.^a

Under the sixth, seventh and eighth causes of amercement mentioned in the preceding section, the officer is amerced in the amount of the money withheld, with ten per centum thereon.^b

Under the ninth and tenth causes above mentioned, the officer may be amerced in any sum not exceeding the plaintiff's debt or demand, with costs.^c

(k) Swan's Stat. 484.

(l) 2 Ohio Rep. 503.

(m) 10 Ohio Rep. 45; Wright's Rep. 720; 12 Ohio Rep. 290.

(n) 12 Ohio Rep. 220.

(o) 10 Ohio Rep. 45.

(a) 12 Ohio Rep. 2:0.

(b) Swan's Stat. 484.

(c) Id. 650, 324, 484

 Proceedings on Amercement.

SEC. III. PROCEEDINGS ON AMERCEMENT.

The proceeding is by motion in the court to which the writ was returnable, except under the ninth particular mentioned in the preceding section. Under that particular the proceedings are had in the Court of Common Pleas of the county in which the neglect of duty occurs.

The first step is, to give the officer two days' notice, in writing, that the motion to amerce will be made, if he is an officer of the county in which the proceeding is had. If he is an officer of any other county than that from which the execution issued, notice must be given him by leaving with him, or at his office, a written copy of such notice, at least fifteen days before the first day of the term at which such motion is intended to be made; or, by enclosing and transmitting by mail, a written copy of such notice, directed to such officer, at least sixty days previous to the first day of the term at which such motion is intended to be made.⁴

No pleadings are necessary on this motion.*

The notice to the sheriff may be in the form following, but of course varies according to the cause of amercement:

Form of Notice of Motion to the Sheriff.

To S. S., Sheriff of — county :

SIR: Please to take notice that on the — day of — next, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard, I shall move the Court of Common Pleas of — county to amerce you, for [*here state the grounds of the motion. If for neglect to return the writ, thus:* for neglecting to return a certain writ of execution commonly called a fieri facias, to you directed, which on or about the — day of —, A. D. —, came to your hands, as said sheriff, to be executed and returned in due form of law, for the sum of [debt \$—, damages \$—, costs —, *as the case may be,*] tested the — day of —, and then issued at my instance from said court against C. D. upon a certain judgment of the same court in that behalf, rendered, at the — term thereof, A. D. —.

A. B.

[Date.]

Form of Affidavit of Service of Notice.

The State of Ohio, — county, ss.

L. S., of, [etc.,] makes oath and says, that on the — day of —, A. D.

(d) Swan's Stat. 484, 485.

(e) 6 Ohio Rep. 449; 12 Ohio Rep. 210

Judgment.

—, he served on the [within] named S. S., sheriff of said county, the within notice, by delivering to him a true copy thereof, in person, at —.

L. S.

Sworn to, [&c.]

Form of Judgment of Amercement.

<p>A. B. v. S. S., [late] Sheriff of the county of —.</p>	}	On motion to Amerce.
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This day appeared in open court the above named A. B., by Mr. L., his attorney, and moved the court here for a judgment of amercement against the said S. S., [late] sheriff of the county of —, for [*here state the cause of amercement, as in the notice, as thus:* for neglecting to return] a certain writ of execution, commonly called a fieri facias, to him directed, which came into his hands as such sheriff, to be executed and returned by him in due form of law, and as hereinafter mentioned. And thereupon came the said S. S., and this motion came on to be heard upon the files and records of the court, affidavits and testimony.^f On consideration whereof the court do find:

1. That by the consideration and judgment of this court, at their — term, A. D. —, the said A. B. recovered a judgment in [Assumpsit] against C. D., for the sum of \$— [*here set forth the amount of the judgment and costs*] costs, which hath ever since remained in full force and unsatisfied.

2. That the said A. B. on, [&c.] caused to be issued under the seal of, and from the said court, upon said judgment and against the said C. D., a writ of execution commonly called a Fieri Facias, directed to the sheriff of said county, whereby the State of Ohio commanded, [*here recite the execution,*] and which said execution was duly tested on, [&c.] and signed by the clerk of said court, and indorsed with the amount of said judgment, &c.

3. That said execution, on, [&c.] came into the hands of said S. S., to be executed and returned according to the command thereof, he, the said S. S., then, and until long after the return term of said execution, continuing to be the sheriff of said county.

4. *Here state the acts or omissions of duty, under the execution, which render the officer liable: that is, money made and demanded, and refusal to pay—or levy on goods and refusal or neglect to sell—or the like. Thus, if for neglect to return the execution:* That by said execution, the said S. S. was, as such sheriff, commanded, and it was his duty to return said writ to said court at, [&c.] on or before the [second] day of the — term, A. D. —, of said court, begun and held on the — [*insert the first day of the term*] of —, A. D. —; and that the said S. S. neglected so to do.

5. That on the — day of —, A. D. —, the said A. B. served on the said S. S. due notice, in writing, of this motion to amerce him, by reason of the premises:

(f) If the proceeding is to be reviewed on certiorari, insert at the [f] the evidence upon which the court decided the motion.

Judgment — Liability of Sureties — Remedy of Sheriff.

It is therefore ordered and considered, that the said S. S. be, and he is hereby amerced, for his said default and [neglect to return, as aforesaid, said execution to him directed,] in the sum of, [*original judgment, interest and costs,*] the amount of said judgment, costs and interest, remaining due and unpaid; and also the further sum of ——— dollars, being ten per centum penalty thereon; and that the said A. B. recover the same of and from the said S. S., according to the force and effect of the statute in such case made and provided.

The sureties of the officer may be made parties to the judgment of amercement, by *scire facias*.^d

Upon judgment on the *Scire Facias*, an execution, in the name and for the use of the judgment creditor or his legal representatives, may, on motion, be awarded against the body of the officer, and against his goods and chattels, lands and tenements, and the goods and chattels, lands and tenements of his sureties, who are made parties by the *scire facias*; but the property of the officer must be found insufficient before the property of the sureties can be taken.*

Where an officer is amerced and has not collected the original judgment, he may sue out execution and collect the judgment, in the name of the original plaintiff, for his own use.^f

(d) Swan's Stat. 485. For the Form, &c. of the *scire Facias* in such case, see post, Chap. 36.

(e) Swan's Stat. 485.

(f) Swan's Stat. 435, sec. 37.

CHAPTER XXXV.

THE DECEASE OR MARRIAGE OF THE PARTIES TO AN ACTION.

SECTION I. THE MARRIAGE OF A FEME SOLE, PLAINTIFF OR DEFENDANT.

- II. THE DEATH OF THE PLAINTIFF OR DEFENDANT, BEFORE VERDICT.
 - III. THE DEATH OF ONE OF TWO OR MORE PLAINTIFFS OR DEFENDANTS.
 - IV. THE DEATH OF PARTIES AFTER VERDICT ; OR, AFTER JUDGMENT.
-

SEC. I. THE MARRIAGE OF A FEME SOLE, PLAINTIFF OR DEFENDANT.

An action commenced against a feme sole, will not abate in consequence of her marriage ; but a suggestion of her marriage is made on the journal of the court, and the name of the husband being inserted in the proceedings, the suit is conducted to trial, judgment and execution, in all other respects as if no marriage had taken place.^a

The marriage of a defendant is not noticed, and does not affect the proceedings.^b

Suggestion of Marriage of Plaintiff on the Journal.

A. B. }
v. } In Assumpsit.
C. D. }

The plaintiff gives the court here to understand and be informed, that since the last continuance of this cause she intermarried with one L. L. ; which the defendant doth not deny, but admits the same to be true, and the said L. L. is made a party to this suit. Continued.

SEC. II. THE DEATH OF THE PLAINTIFF OR DEFENDANT, BEFORE VERDICT.

The statute of 1831,^c provides that no suit or action (except actions for libel, slander, malicious prosecution, assault, or assault and battery, action on the

(a) 43 vol. Stat. 114, sec. 3.

(c) Swan's Stat. 667, sec. 80.

(b) Gro. Jac. 323 ; 4 East, 521 ; 3 Bl. Com. 414.

Before Verdict

case for a nuisance, or against justices of the peace for misconduct in office) shall abate by the death of either, or both of the parties thereto.

This law is so far modified by the act of March 12, 1845,^d that an action of trespass on the case, or other action founded on a tort, does not abate by the death of the plaintiff. This recent statute making no provision against the abatement of the suits therein provided for, in case the defendant dies, of course, they abate by the decease of the defendant, and cannot be revived against his legal representatives.

It is however provided,^e that if any person, having a right to commence and maintain an action of trespass, or trespass on the case, for mesne profits; or, for an injury done or suffered to his estate, real or personal; or, for any deceit or fraud committed in the sale or exchange thereof; or, if any person liable to either of such actions shall die before such action shall be brought, the cause of such action shall nevertheless survive. And any such action may be brought by the executor or administrator of the deceased party, having such right of action, or it may be brought against the executor or administrator of the deceased party, liable to such action; and it may be proceeded in to final judgment and execution, as in other cases, for or against executors and administrators.

In proceedings in attachment against absconding and non-resident debtors, the death of the defendant will not abate the suit; but the same is carried on to judgment, sale and distribution, as if such death had not happened.^f

In all cases in which either party to a suit dies before the first day of the term at which judgment is taken, if the suit, as above provided by law, does not abate, the executor or administrator of the deceased party will have a right to prosecute or defend the suit.^g The executor or administrator of the deceased defendant is required by law to become a party to the suit.^h

In practice, there is in general no embarrassment in making the executor or administrator of a deceased plaintiff or defendant a party to the suit, as the attorney for the executor or administrator usually appears, and the entry is made on the journal, by consent.

Form of Journal Entry making the Executor or Administrator a party, by consent.

A. B. }
v. } In Assumpsit.
C. D. }

The death of the plaintiff [or defendant] was suggested; and thereupon E. F., his administrator [or executor,] applied to be made plaintiff [or defendant] in his stead, and the same is ordered accordingly. Continued.

If, however, the executor or administrator of the deceased plaintiff or

(d) 43 vol. Stat. 114, sec. 2.

(e) Id. 669, sec. 90.

(f) Id. 93, sec. 14.

(g) Swan's Stat. 667, sec. 80.

Before Verdict.

defendant, neglect or refuse to apply to the court, at or during the term next succeeding the death of the party, the court at the same term will order the death of the party to be suggested on the record, and a citation to issue, returnable to the next term thereafter.^b The citation cites the executor or administrator to appear at its return term, and cause himself to be made a party to the suit, instead of the decedent.^b

The Order of the court and the Citation in such case, may be in the form following :

Order for Citation.

A. B. }
v. } In Case.
C. D. }

This day, it being suggested to the court that the [defendant,] since the last term, has died [intestate,] and that J. S. is his [administrator ;] and the said J. S., neglecting to apply to be made defendant, instead of the said C. D., it is therefore, on motion of the said A. B., ordered, that the defendant's death be suggested on the record, and that a citation issue against the said J. S., as [administrator] of the said C. D., according to the statute in such case made and provided.

Form of Citation.

The State of Ohio, — county, ss.

[SEAL.] To the Sheriff of — county—Greeting:

Whereas, A. B., lately in our Court of Common Pleas, within and for the said county of —, to wit, at the — term thereof, A. D. —, impleaded C. D. in a certain plea [of the case, &c., *as the plea is ;*] and afterwards and before final judgment, the said C. D. died intestate, to wit, on —, whose death was afterwards, to wit, at the — term of said court, A. D. —, suggested on the record of the same court ; and administration upon his estate has been granted by the Court of — to J. S., in due form of law, as we are informed by the said A. B. And now, on behalf of the said A. B., we have been informed, in our said Court of Common Pleas, that, although the said suit is still pending, and in no wise abated or discontinued, yet the said J. S., administrator as aforesaid, altogether neglects to appear and make himself defendant thereto. We therefore command you that you cite the said J. S., administrator as aforesaid, to appear before the Judges of our said Court of Common Pleas, on the first day of their next term, and cause himself to be made defendant in said suit, instead of the said C. D. And of this fail not ; and have you then there this writ.

Witness, F. C., clerk of our said Court of Common Pleas, at C. this — day of —, A. D. —.

F. C., Clerk.

Where there are two or more Plaintiffs or Defendants.

If the executor or administrator of the deceased plaintiff neglect or refuse, after being served with the citation, to become a party to the action, a judgment of nonsuit and for costs will be entered against him as such executor or administrator.¹

If the executor or administrator of the deceased defendant, after being served with the citation, neglect or refuse to appear and make himself a party, the court will cause his appearance to be entered, and the cause will then proceed as if suit had been originally brought against the executor or administrator.¹

An administrator with the will annexed, or an administrator de bonis non, may, in the manner above mentioned, be made a party plaintiff or defendant to a suit pending against the former executor or administrator.²

So, where there is an action of ejectment or for waste pending, it will not abate by the death of the defendant before final judgment; but the cause of action will survive against the heir or devisee who may be made a party defendant in the manner above mentioned.¹ If the heir or devisee, after being cited, neglect or refuse to appear, the court will enter his appearance; and the cause will be afterwards proceeded in and tried, and judgment rendered, as if the action had been originally brought against such heir or devisee.

If an estate is represented as insolvent while an action is pending against an executor or administrator, for any demand that is not entitled to a preference in payment, and would be affected by the insolvency of the estate, the action may be discontinued without the payment of costs; or, if the demand is disputed, the action may be tried and determined, and judgment may be rendered therein, in the same manner and with the same effect, as is provided in the case of appeal from the award of commissioners upon an insolvent estate, (that is, no execution is to issue, but the report of the debts of the estate will be altered so as to include the judgment;) or, the action may be continued at the discretion of the court, until it shall appear whether the estate is insolvent; and if it should not prove to be insolvent, the plaintiff may prosecute the action as if no such representation of insolvency had been made.² There is no impropriety in the plaintiff continuing his action, while he submits his claim to the commissioners, or to the executor or administrator, when acting in the place of commissioners.³

SEC. III. THE DEATH OF ONE OF TWO OR MORE PLAINTIFFS OR DEFENDANTS.

When there are two or more plaintiffs or defendants, and one or more die before the first day of the term in which judgment is rendered, the cause of action will not abate, but survive to and against the surviving plaintiffs or de-

(i) Swan's Stat. 666, sec. 83.

(j) Id. 668, sec. 84.

(k) Id. 384, sec. 240, 241.

(l) Id. 669, sec. 88.

(m) Id. 380, sec. 224.

(n) 4 Mass. Rep. 620.

During the Trial Term; or after Judgment.

endants.* In such case the death is suggested on the record, and the suit proceeds in the same manner, as if such death had not happened.^o

The suggestion may be in the form following :

Suggestion of the Death of one of the Defendants.

A. B.	}	In [Assumpsit.]
v.		
C. D. and E. F.		

The said plaintiff, by Mr. A., his attorney, gives the court here to understand and be informed, that after the last continuance of this cause, and before this day, [to wit, on, &c.,] the said E. F. died, and the said C. D. survived; which the said C. D. doth not deny, but admits the same to be true.

After final judgment against the survivors, the surviving plaintiff or plaintiffs may make the executor or administrator of the deceased defendant a party to the judgment, by *scire facias*.^p

SEC. IV. THE DEATH OF PARTIES DURING THE TRIAL TERM ; OR, AFTER JUDGMENT.

If either party dies during the term, and after verdict, &c., before the judgment is entered, judgment may, notwithstanding, be entered as if the death had not occurred ; as the judgment is, in law, rendered on the first day of the term, though in fact rendered afterwards.

If either party, or both, die after final judgment, and before satisfaction thereof, the suit may be revived by *scire facias*. If the defendant dies, the plaintiff may revive by *scire facias* against the executors or administrators, under like circumstances as the plaintiff could or might sue the executor or administrator upon a debt not in judgment.^q And such *scire facias* should be prosecuted within the same period required by law for the prosecution of other claims against the estate of a decedent.^r

The claim against the estate of the decedent, accruing by such judgment, should be presented to the executor or administrator in like manner, and within like time, as any other demand,^s and if disputed or rejected, must be established by suit or arbitrament.

When there are two or more defendants, and the judgment is founded upon a joint contract, and either of the defendants die, his estate is liable therefor,

(o) Swan's Stat. 668 § 85.

(p) Id. 669, § 86, 87. For the form of the *scire facias*, judgment, &c., see the next chapter.

(q) Swan's Stat. 673, § 105 & 106; 356, § 98.

(r) Id., 357, § 103; 45 vol. Stat. 25.

(s) Id., 354, § 90. Procure a memorandum of the date and amount of the judgment, attested by the clerk, and present it to the executor or administrator.

18. After a Judgment of the Common Pleas, affirmed in the Supreme Court, and mandate sent down.
19. To make Defendants, not served with original process parties to the Judgment.
20. To make Sureties of the Sheriff parties to a Judgment of Amercement.
21. To make persons jointly liable, parties to a Judgment confessed.
22. To make persons jointly liable, parties to a Judgment in the Common Pleas on Appeal from a Justice.
23. By a Surviving Plaintiff against the Administrator of a Joint Defendant, who died pending the suit.
24. By Husband and Wife on a Judgment recovered by the Wife dum sola.
25. Against Husband and Wife, upon a Judgment recovered against the Wife dum sola.
26. Against Special Bail.
27. To subject Real Estate to the payment of a Judgment of a Justice of the Peace.
28. By Sureties who have paid the debt, against the Principal.
29. Against an Administrator suggesting a Devastavit.
30. Against Heirs and Terre-tenants.
31. For Restitution, after Reversal and mandate sent down from the Supreme Court.
32. Alias Scire Facias.

IV. HOW EXECUTED AND RETURNED.

V. WHEN AMENDABLE, AND WHEN SET ASIDE.

VI. PLEADINGS IN SCIRE FACIAS.

VII. FORMS OF PLEAS IN SCIRE FACIAS.

1. Nul tiel record.
2. Payment.
3. Death of Principal before return of Capias and Satisfacendum.
4. Plea to a Scire Facias for Costs against Sureties, — that the summons was not indorsed until after suit brought.

VIII. VERDICTS AND JUDGMENTS.

1. Verdict and Judgment for Plaintiff on issue to the country.
2. Judgment for Plaintiff on submission to the Court.
3. The like against an Executor or Administrator.

 Nature of the Writ, and in what cases issued.

4. Verdict and Judgment for Plaintiff, on suggestion of further Breaches under the Statute; Damages assessed by the Jury.
5. Verdict and Judgment making Defendants, not served with process, parties to the original Judgment.
6. Judgment of Revivor, on default.
7. The like against an Executor or Administrator on Default.
8. Judgment by Default making Defendants, not served with process, parties to the original Judgment.
9. The like by Default, on suggestion of further Breaches, after Judgment on Penal Bond.
10. The like by Default, subjecting Real Estate to the payment of a Judgment of a Justice of the Peace.
11. Judgment for the Defendant.

 SEC. I. NATURE OF THE WRIT, AND IN WHAT CASES ISSUED.

 1. *Generally.*

A scire facias is a writ founded upon some matter of record, as judgments, recognizances, and the like: and its office is to make known to the defendant some matter, of which he has a right to be informed, and to afford him an opportunity, if he sees fit, to show cause why a certain step should not be taken against him.* It is sometimes issued in a cause while pending, and is sometimes of itself a new action.

Where a levy was made on lands, and the defendant and sheriff afterwards died, and then another fieri facias was issued to the successor of the old sheriff, and another levy made, and sale had to the judgment creditor, and satisfaction entered on the record; it was held, that all the proceedings after the first levy were void, and might be set aside on scire facias, at the suit of the plaintiff in execution.^b But if the title to land sold on execution fails, after deed made and satisfaction entered, the purchaser has no remedy by scire facias.^c

Where a judgment debtor died, and his administrator made a sale of real estate which was void for irregularity, it was held, that the judgment creditor might, notwithstanding, proceed by scire facias against the heirs and purchasers in possession, and have execution against the lands.^d

Where there is a general judgment of restitution in error, execution cannot be sued out without a scire facias.^e

(a) 2 Saund. Rep. 74, (4.)

(b) 1 Ohio Rep. 458.

(c) 6 Ohio Rep. 477.

(d) 7 Ohio Rep. (part 1,) 11.

(e) 4 Ohio Rep. 374. See post. ch. 38, § 13, 6.

To revive Judgment — To make parties to a Judgment.

2. *To revive a dormant Judgment.*

An action of debt may be brought, or scire facias may be issued against the judgment debtor, or his legal representatives, to revive a dormant judgment.^f The scire facias is sued out of the court rendering the judgment, or the court having power to award execution.^g

The defendant may plead any matter arising subsequent to the rendition of the judgment, which shows that execution should not be awarded.^h

3. *To make Parties to a Judgment.*

Where either or both parties to a judgment die before satisfaction, their representatives, real or personal, as the case may require, may be made parties thereto by scire facias.ⁱ It may be prosecuted jointly against the representatives of the deceased and the survivors; and this, too, although the deceased was surety only.^j

So, if an executor or administrator, for or against whom an unsatisfied judgment has been rendered, die, resign, or be removed from his trust, the administrator de bonis non may be made party to the judgment by scire facias.^k

So, where pending a suit against two or more, one or more die, after judgment against the survivors, the deceased defendants may be made parties to the judgment by scire facias.^l

So, where mesne process is issued against two or more, and some of the defendants are not served, and the plaintiff proceeds and obtains judgment against such of them as were served with process, the plaintiff may, by scire facias against those not served, make them parties to the judgment.^m

So, where one or more of two or more debtors, jointly, or jointly and severally liable, confesses judgment; or, where a judgment is rendered on such a liability by the Court of Common Pleas, on an appeal from a justice, the other parties to the contract or liability may, in like manner, be made parties to the judgment.ⁿ

The sureties of the sheriff, or other officer who is amerced, may be made parties to the judgment of amercement by scire facias.^o The sureties may set up any defence arising after the judgment of amercement, but no matters previous thereto.^p

The execution in such case has already been noticed.^q

(f) *Id.*, 671, § 102.

(g) *Id.* *Ib.*, § 104.

(h) *Swan's Stat.* 673; 46 vol. *Stat.* 27, 28.

(i) 7 *Ohio Rep.* (Part 1) 165.

(j) *Swan's Stat.* 686, sec. 139.

(k) *Id.* 669, sec. 86.

(l) *Id.* 658, sec. 53.

(m) *Id.* *Ib.* sec. 54.

(n) *Swan's Stat.* 485, sec. 36.

(o) See ante p. 1086.

For further Breaches of Bond—To charge Land, &c.

4. *To recover Damages for further Breaches, on a Judgment for a Penalty.*

We have already seen, in what cases a scire facias may be issued to recover damages for breaches of a penal bond or contract, which have arisen after judgment for the penalty.

Where a judgment has been rendered upon an official bond for the penalty, any person injured by the misconduct of the officer, may proceed by scire facias on such judgment, until the amount thereof is exhausted. Of course the breaches upon which the party suing relies, must be set forth.⁴

5. *To charge Lands on a Judgment of a Justice.*⁵

Where an execution issued by a justice of the peace, in any civil or criminal case, is returned unsatisfied, in whole or in part, for want of goods and chattels found whereon to levy, and it is suggested to the justice of the peace, charged with the duty of collecting the judgment whereon the execution is issued, that the party against whom the judgment was rendered, is possessed of lands or tenements, the justice must make an entry of such suggestion on his docket; and, on the application of the party in whose favor such judgment was obtained, or his agent, deliver to such party or his agent, a certified transcript of the judgment and suggestion, including the proceedings had, and the costs that have accrued thereon.

The party, or his agent, receiving such transcript, may deliver the same to the clerk of the Court of Common Pleas of any county where the party, against whom such judgment was recovered, may reside; and the clerk files the same in his office, and issues a writ of scire facias thereon, which is served and returned in the same manner that a summons, issued from such court, is or may be required by law to be served and returned in other cases. But if the defendant does not reside, or cannot be found in the county, two "*nihilis*" will be sufficient.

The scire facias requires the party, against whom it is issued, to show cause, at the return term thereof, why execution should not be awarded against the lands and tenements of such party; and in case no cause be shown, the court render judgment against the party, for the costs that have accrued in the proceedings by scire facias, and award execution against the lands and tenements of such party, for the debt, fine, or damages, including the interest and costs, stated in such transcript, or for so much thereof as may remain due and unsatisfied, and for costs of suit; on which execution the same proceedings are had

(p) Ante p. 355, note, where the statute will be found. ecutor's or administrator's bond, see Stat. 373 to 375.

(q) *Id.* 162, sec. 4; as to a suit upon an ex- (r) *Swan's Stat.* 521, 533; 44 vol. *Stat.* 48.

By Sareties — To charge Administrator, &c. — Special Bail.

as if the like execution had been issued on any other judgment obtained in such court.

It is not necessary to take a rule on the defendant to plead to the scire facias, and execution may be awarded at the return term of the scire facias served, or at the return term of the second nihil.^a

The judgment becomes a lien on the defendant's land from the time execution is awarded by the court; and the execution issued, upon the award of execution, goes against the goods and chattels, as well as the lands and tenements of the judgment debtor.¹

6. *By Bail to charge their Principal.*

When any bail has been compelled to pay the amount of a judgment, or any part thereof, the court before whom the judgment was rendered may, upon the request of such bail, issue a scire facias against the person or persons against whom judgment was originally given, to appear before such court, to be served and returned by the proper officer. The suit is heard and determined as in other cases.²

7. *To charge an Executor or Administrator with Waste.*

When an execution against an executor or administrator, for a debt due from the deceased, is returned unsatisfied, the creditor may sue out a scire facias, upon a suggestion of waste; and if the defendant shall not appear and show sufficient cause to the contrary, he shall be deemed guilty of waste, and is personally liable for the amount of such waste, when it can be ascertained; and if the amount of such waste cannot be ascertained, he will be liable for the amount due on the original judgment, with interest thereon from the time when it was rendered, as for his own debt.³

8. *To charge Special Bail.*

Upon a ca. sa. being returned "not found," the plaintiff may proceed against the special bail, by scire facias,⁴ or action of debt.

If, however, at any time before or after judgment against the special bail, a writ of error is sued out on the original judgment against the principal, the court

(a) 4 Ohio Rep. 135.

(t) 44 vol. Stat. 48, secs. 3, 4.

(u) Id. 779, sec. 6.

(v) Id. 356, sec. 97.

(w) Id. 657, sec. 50; Arch. Pr. 291.

To charge Special Bail.

may, on motion, stay proceedings against the bail for a reasonable time, on their paying all costs that may have accrued in the proceedings against them ; and the final reversal of the judgment will discharge the bail.*

The defendant may render himself, or be rendered in discharge of his special bail, either before or after judgment in the original action ; provided, such render be made at or before the appearance day of the first scire facias against the bail returned "scire feci ;" or, of the second scire facias returned "nihil ;" or, of the summons or capias ad respondendum, in an action of debt against the special bail, returned "served," and not after ; and in either case, the bail must pay, and the court will render judgment for, the costs of the suit against them.*

The render, above mentioned, may be made to the court while in session, or to a judge in vacation. The court or judge before whom the render is made, makes an entry or minute of such render and commitment, and thereupon the defendant is committed to the custody of the sheriff or jailor attending the court or judge.* On such render or commitment, duly certified to the clerk of the court, if done in vacation, he must enter an exoneretur on the bail piece ; and thereupon the bail will be discharged ; provided, the bail give immediate notice of such render to the plaintiff or his attorney, if within the county.*

The forms incident to these proceedings may be as follows :

Form of Minute on the Journal of the Court, or by a Judge, of the Render of the Principal.

A. B. }
v. } [—— Com. Pleas.]
C. D. }

C. D., the above named defendant, on this [——] day [of ——, A. D. ——, omit the matter in brackets if it be a journal entry of the court,] rendered himself (or was rendered) in discharge of his special bail, at the suit of the above named plaintiff, and was thereupon committed [by me] to the custody of the sheriff, &c., there to remain, until, &c.

[M. M., Associate Judge
of —— county.]

[To the Clerk of —— Com. Pleas.]

[Date.]

Notice to the Attorney of the Plaintiff.

A. B. }
v. } —— Com. Pleas.
C. D. }

Take notice, that the above defendant this day rendered himself [or was rendered] in discharge of his bail, at the suit of the above plaintiff, and was

(x) Swan's Stat. 657, sec. 51.

(y) Id. 656, sec. 45.

(z) Swan's Stat. 656.

To charge Special Bail — *Præcipe* for Scire Facias.

thereupon committed by M. M., associate judge of — county, to the custody of the sheriff, &c., there to remain, until, &c.

Yours, &c.

L. L., Defendant's Attorney.

To S. S., Plff's Att'y.

[*Date.*]

The defendant's attorney, after serving the above notice, will attach an affidavit of service to a copy, and annex the same to the minute of the associate judge, and file them with the clerk, who will make the following indorsement on the bail piece.^a

Indorsement of Clerk on Bail Piece.

Jan'y 21, 1860. The within named C. D. this day rendered himself [*or was rendered*] in discharge of his special bail, within named, and committed to the custody of the sheriff by M. M., associate judge of — county, whereby the said bail are exonerated in the premises.

Attest, C. C., Clerk.

If the principal dies after the return of the *ca. sa.*, and before the period expires in which the bail have a right to render him, as above mentioned, the special bail will be discharged.^b

There must be at least fifteen days between the service and the return of a summons or scire facias against special bail.^c

SEC. II. *PRÆCIPE* FOR SCIRE FACIAS.

J. S.
v.
L. M. and O. P. } Scire Facias.

Issue a scire facias against L. M. and O. P., upon their recognizance of bail at the — term of the court of A. D. —, in a plea of *debt* or *case*, &c., at the suit of the said J. S. against I. N.; *or*, To revive a judgment of the term of —, in the court of — A. D. —, in favor of J. S. against I. N., for — dollars *damages*, and — dollars costs, [*or, as the case may be,*] returnable at *next term*.

T. S., Attorney for Plaintiff.

To the Clerk of — Com. Pleas.

Dated, &c.

(a) See bail piece, ante p. 170.

(b) 1 Ohio Rep. 35.

(c) Swan's Stat. 656, sec. 45.

To revive Judgments.

SEC. III. FORMS OF WRITS OF SCIRE FACIAS.⁴

1. *Scire Facias to Revive Judgment in Assumpsit.*⁵

The State of Ohio, ——— County, ss.

[SEAL.] To the Sheriff of ——— County, Greeting :

Whereas A. B. lately, to wit, on the ——— day of ———, A. D. ———, in our Court of Common Pleas, within and for the county of ———, by the judgment of the same court,* recovered against C. D. ——— dollars, for his damages, which he had sustained by reason of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B.; and also ——— dollars, for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record. And now on the behalf of the said A. B., in our said Court of Common Pleas, we have been informed, that although judgment be thereupon given, which he avers still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied, yet execution of the damages and costs aforesaid still remains to be made to him; wherefore the said A. B. hath besought us to provide him a proper remedy in this behalf: And we being willing that what is just in this behalf should be done, command you, that you make known to the said C. D. that he be before the judges of our said Court of Common Pleas, on the [first day of their next term,] to show, if he has or knows of any thing to say for himself, why the said A. B. ought not to have his execution against him, of the damages and costs aforesaid, according to the force, form and effect of the said recovery, if it shall seem expedient for him so to do; and further to do and receive what our said court shall then and there consider of him in this behalf; and have you then there this writ.

Witness F. C., Clerk of said Court of Common Pleas, at C., this ——— day of ———, A. D. ———.

F. C., Clerk.

2. *The like, in Debt.*

*Commence as in No. 1, ante, to *,] recovered against the said C. D. a cer-*

(d) Mr. Wilcox, in the second edition of *Ohio Forms, &c.*, has very carefully adapted the English forms of writs of scire facias, &c., to the Ohio statutes; and the forms here given are taken substantially, and most of them literally, from his work.

(e) In a scire facias to revive a judgment, it is unnecessary to aver specifically, that no execution has been issued for five years; the court will look at the date of the scire facias and of the judgment, and see whether the five years have elapsed or not; 6 Ohio Rep. 418; 11 Id.

45. In a scire facias to revive a joint judgment in ejectment, against several defendants, the plaintiff, it seems, cannot proceed till all the defendants are before the court, either by actual service, or by two nibils; 11 Ohio Rep. 45. It is not enough, in such scire facias, to recite that a judgment was "lately" recovered, &c.; it ought to appear that the judgment had become dormant by lapse of time, or otherwise; Id. It seems that a scire facias, to revive a judgment, is only a continuation of the former suit, and is not an original proceeding; 4 Ohio Rep. 397.

 To revive Judgments.

tain debt of — dollars, and also — dollars, which in the same court were adjudged to the said A. B. for his damages which he had sustained by reason of the detention of the said debt, and, also — dollars for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, as appears to us of record. And now, on behalf of the said A. B. in our said court, we have been informed that although judgment be thereupon given, which he avers still remains in full force and effect, is in no wise set aside, reversed, paid off, or satisfied, yet execution of the debt and damages, and costs aforesaid, still remains to be made to him; wherefore the said A. B. hath besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf, should be done, command you that you make known to the said C. D. that he be before the Judges of our said Court of Common Pleas on [the first day of their next term,] to show, if he has or knows of any thing to say for himself, why the said A. B. ought not to have his execution against him, of the debt and damages and costs aforesaid, according to the force, form and effect of the said recovery, [*&c.*, conclude as in the last precedent.

 3. *The like, in Covenant.*

Commence as in No. 1, ante, 1101,] recovered against C. D. — dollars for his damages which he had sustained by reason of the breach of a certain covenant made between the said A. B. and C. D.; and also — dollars for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, [*&c.*]

 4. *The like, in Case.*

— For his damages which he had sustained by reason of a certain grievance then lately committed by the said C. D., and, [*&c.*]

 5. *The like, in Replevin.*

— For his damages which he had sustained by reason of the wrongful detaining of the cattle, goods and chattels of the said C. D., and, [*&c.*]

 6. *The like, in Trespass.*

— For his damages which he had sustained by reason of certain trespasses then lately committed by the said C. D., and, [*&c.*]

To revive in Ejectment — For surviving Plaintiff.

7. *The like, in Ejectment.*

Commence as in No. 1, ante, 1101:] Whereas, A. B., lately, to wit, on the — day of —, A. D. —, in our Court of Common Pleas within and for the said county of —, by the judgment of the same court, recovered against C. D. his term yet to come of and in one messuage, [&c. ; describe the premises as in the declaration or verdict,] in your county, which E. F. on the — day of —, A. D. —, had demised to the said A. B., to have and to hold the same to the said A. B. and his assigns, from the — day of — then last past, for and during and unto the full end and term of — years from thence next ensuing, and fully to be complete and ended; by virtue of which said demise, the said A. B. entered into the tenements aforesaid, with the appurtenances, and was thereof possessed, until the said C. D. afterwards, to wit, on the — day of —, in the — aforesaid, with force and arms, &c., entered into the tenements aforesaid with the appurtenances, which the said E. F. had demised to the said A. B. in manner and for the term aforesaid, which is not yet expired, and ejected the said A. B. from his said farm; and also — dollars, for the damages which the said A. B. had sustained by reason of the trespass and ejectment aforesaid; and also — dollars for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, as appears to us of record. And now, on the part of the said A. B. in our said Court of Common Pleas, we have been informed that although judgment be thereupon given, which he avers still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied, yet execution of that judgment still remains to be made to him; wherefore the said A. B. hath besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you that you make known to the said C. D. that he be before the Judges of our said Court of Common Pleas on [the first day of their next term,] to show, if he has or knows of any thing to say for himself, [or if the judgment was against the casual ejector, or if the scire facias be against him, &c., the sheriff should be commanded to make known to the said C. D., &c., and also to — and —, the tenants of the tenements aforesaid, that they be, &c., to show, if they have or know, or if either of them hath or knoweth of any thing to say for themselves or himself,] why the said A. B. ought not to have the possession of his said term yet to come of and in the tenements aforesaid with the appurtenances, and also execution of the damages, costs and charges aforesaid, according, [&c. ; conclude as in No. 1, ante, 1101.

8. *Scire Facias for a Surviving Plaintiff.*

Commence as in No. 1, ante, 1101:] Whereas, A. B. and C. D. lately, to wit, on the — day of —, A. D. —, in our Court of Common Pleas

To revive Judgments.

tain debt of — dollars, and also — dollars, which in the same court were adjudged to the said A. B. for his damages which he had sustained by reason of the detention of the said debt, and also — dollars for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, as appears to us of record. And now, on behalf of the said A. B. in our said court, we have been informed that although judgment be thereupon given, which he avers still remains in full force and effect, is in no wise set aside, reversed, paid off, or satisfied, yet execution of the debt and damages, and costs aforesaid, still remains to be made to him; wherefore the said A. B. hath besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf, should be done, command you that you make known to the said C. D. that he be before the Judges of our said Court of Common Pleas on [the first day of their next term.] to show, if he has or knows of any thing to say for himself, why the said A. B. ought not to have his execution against him, of the debt and damages and costs aforesaid, according to the force, form and effect of the said recovery, [*&c.*, conclude as in the last precedent.

3. *The like, in Covenant.*

Commence as in No. 1, ante, 1101.] recovered against C. D. — dollars for his damages which he had sustained by reason of the breach of a certain covenant made between the said A. B. and C. D.; and also — dollars for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, [*&c.*]

4. *The like, in Case.*

— For his damages which he had sustained by reason of a certain grievance then lately committed by the said C. D., and, [*&c.*]

5. *The like, in Replevin.*

— For his damages which he had sustained by reason of the wrongful detaining of the cattle, goods and chattels of the said C. D., and, [*&c.*]

6. *The like, in Trespass.*

— For his damages which he had sustained by reason of certain trespasses then lately committed by the said C. D., and, [*&c.*]

To revive in Ejectment — For surviving Plaintiff.

7. *The like, in Ejectment.*

Commence as in No. 1, ante, 1101:] Whereas, A. B., lately, to wit, on the — day of —, A. D. —, in our Court of Common Pleas within and for the said county of —, by the judgment of the same court, recovered against C. D. his term yet to come of and in one messuage, [*&c. ; describe the premises as in the declaration or verdict,*] in your county, which E. F. on the — day of —, A. D. —, had demised to the said A. B., to have and to hold the same to the said A. B. and his assigns, from the — day of — then last past, for and during and unto the full end and term of — years from thence next ensuing, and fully to be complete and ended; by virtue of which said demise, the said A. B. entered into the tenements aforesaid, with the appurtenances, and was thereof possessed, until the said C. D. afterwards, to wit, on the — day of —, in the — aforesaid, with force and arms, &c., entered into the tenements aforesaid with the appurtenances, which the said E. F. had demised to the said A. B. in manner and for the term aforesaid, which is not yet expired, and ejected the said A. B. from his said farm; and also — dollars, for the damages which the said A. B. had sustained by reason of the trespass and ejectment aforesaid; and also — dollars for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, as appears to us of record. And now, on the part of the said A. B. in our said Court of Common Pleas, we have been informed that although judgment be thereupon given, which he avers still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied, yet execution of that judgment still remains to be made to him; wherefore the said A. B. hath besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you that you make known to the said C. D. that he be before the Judges of our said Court of Common Pleas on [the first day of their next term,] to show, if he has or knows of any thing to say for himself, [*or if the judgment was against the casual ejector, or if the scire facias be against him, &c., the sheriff should be commanded to make known to the said C. D., &c., and also to — and —, the tenants of the tenements aforesaid, that they be, &c., to show, if they have or know, or if either of them hath or knoweth of any thing to say for themselves or himself,*] why the said A. B. ought not to have the possession of his said term yet to come of and in the tenements aforesaid with the appurtenances, and also execution of the damages, costs and charges aforesaid, according, [*&c. ; conclude as in No. 1, ante, 1101.*

8. *Scire Facias for a Surviving Plaintiff.*

Commence as in No. 1, ante, 1101:] Whereas, A. B. and C. D. lately, to wit, on the — day of —, A. D. —, in our Court of Common Pleas

To revive, against surviving Defendant — and Administrator.

within and for the said county of —, by the judgment of the same court, recovered against E. F. — dollars, [&c.,] whereof the said E. F. is convicted, as appears to us of record; and afterwards, to wit, on, [&c.,] at, [&c.,] the said C. D. died, and the said A. B. then and there survived him, as by the information of the said A. B. in our said Court of Common Pleas we have been given to understand. And now, on behalf of the said A. B. in our said Court of Common Pleas, we have been informed, that although judgment be thereupon given, which, [&c.; as in No. 1, ante, 1101.

9. *The like, against a Surviving Defendant.*

Commence as in No. 1, ante, 1101:] Whereas, A. B., [&c.,] recovered against C. D. and E. F., [&c.,] whereof the said C. D. and E. F. are convicted, as appears to us of record; and afterwards the said E. F. died, to wit, at, [&c.,] and the said C. D. survived him, as by the information of the said A. B. in our said Court of Common Pleas we have been given to understand. And now, on behalf of the said A. B. in our said Court of Common Pleas, we have been informed, that although judgment be thereupon given, [&c., as in No. 1, ante, 1101.

10. *The like, against a Surviving Defendant and the Administrator or Executor of a deceased Defendant, jointly.**

Commence as in No. 1, ante, 1101:] Whereas, A. B., [&c.,] recovered against C. D. and E. F., [&c.,] whereof the said C. D. and E. F. are convicted, as appears to us of record; and afterwards, the said C. D. died, having first duly made and published his last will and testament in writing, and thereby constituted and appointed J. S. executor thereof; after whose death the said J. S. duly proved the said last will and testament of the said C. D., and took upon himself the burthen of the execution thereof, [*or, if he died intestate, say, the said C. D. died intestate, and the said E. F. then survived him,*] and administration of all and singular the goods, chattels and credits which were of the said C. D. at the time of his death, by the Court of —, was granted to J. S. in due form of law; as by the information of the said A. B. in our said Court of Common Pleas we have been given to understand. And now, on behalf of the said A. B. in our said Court of Common Pleas, we have been informed, that although judgment be thereupon given, which he avers still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied, yet execution of the damages and costs aforesaid still remains to be made to him;

(a) Where one of several judgment debtors the survivors; and this, too, though the deceased, a scire facias lies under the statute, jointly was surety merely; Zanesville Canal Co. v. against the representatives of the deceased and Granger, 7 Ohio Rep. 165. Part 1st.

To revive, for and against an Executor.

wherefore, [&c.,] we being willing, [&c.,] do command you that you make known to the said E. F. and J. S., administrator as aforesaid, that they be before the Judges of our said Court of Common Pleas on [the first day of their next term,] to show, if they have or know, or either of them hath or knoweth, of any thing to say for themselves or himself, why the said A. B. ought not to have his execution of the damages and costs aforesaid, as well against the said E. F. to be levied of his own proper goods and chattels, lands and tenements, as against the said J. S., to be levied of the goods and chattels which were of the said C. D. at the time of his death, in the hands of the said E. F., to be administered according to the force, form and effect, [&c., as in No. 1, ante, 1101.

11. *Scire Facias for an Executor.*

Commence as in No 1; ante 1101,] — Whereas, A. B. lately, [&c.] — recovered, [&c.] —, whereof the said C. D. is convicted, as appears to us of record; and afterwards, to wit, on, [&c.] the said A. B. died, having first duly made and published his last will and testament in writing, and thereby constituted and appointed E. F. executor thereof; after whose death the said E. F. duly proved the said last will and testament of the said A. B., and took upon himself the burthen of the execution thereof, as by the information of the said E. F. in our said Court of Common Pleas we have been given to understand. And now, on the behalf of the said E. F. executor as aforesaid, in our said Court of Common Pleas, we have been informed, that although judgment be thereupon given, which he avers still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied, yet execution of the damages, [or, debt and damages,] and costs aforesaid still remains to be made to him; wherefore, the said E. F., executor as aforesaid, has besought us to provide him a proper remedy in this behalf: And we being willing, [&c.,] command you, [&c.,] to show, [&c.,] why the said E. F., executor as aforesaid, ought not to have, [&c., as in No. 1, ante, 1101.

12. *The like, against an Executor.*

Commence as in No. 1, ante, 1101.] — Whereas, A. B. lately, [&c.,] recovered, [&c.,] whereof the said C. D. is convicted, as appears to us of record; and afterwards the said C. D. died, [&c., as in the last form to the words "execution thereof";] as by the information of the said A. B., in our said Court of Common Pleas, we have been given to understand: And now, on the behalf of the said A. B., in our said Court of Common Pleas, we have been informed that, although judgment be thereupon given, which he avers still remains in full force and effect, in no wise set aside, reversed, paid off, or satis-

On Judgment, suggesting further Breaches

informed, that the said debt so by him recovered as aforesaid, and which he avers still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied, was and is a certain penal sum of — dollars, mentioned in a certain writing obligatory made the — day of — A. D. —, at — [&c.] sealed with the seal of the said C. D., and bearing date the day and year last aforesaid, and which the said A. B. now brings here into court, by which said writing obligatory, reciting, [&c.,] it is provided, [&c., *setting forth so much of the condition as is necessary for assigning the further breaches.*] And the said A. B. also gives our said court here to understand and be informed, that the writ of him, the said A. B., in the said action, in which he so obtained such judgment as aforesaid, was sued out of the office of the clerk of the court aforesaid, on the — day of —, A. D. —; and that the said action was brought and commenced upon and for a certain breach of the condition of the said writing obligatory, by the said C. D., before the suing out of the writ aforesaid: But the said A. B., for further and other breaches of the condition of the said writing obligatory, according to the form of the statute in such case made and provided, gives our said court here to understand and be informed, [&c., *assigning further breaches.* See ante, 734,] which said several breaches of the condition of said writing obligatory so assigned, the said A. B. doth aver and give our said court here to understand and be informed, are further and other breaches, than the breaches for and by reason of which he obtained the said judgment so by him recovered as aforesaid; and for which said further and other breaches, he hath besought us to provide him a proper remedy:— And we being willing, that what is just in this behalf should be done, do, according to the form of the statute in such case made and provided, command you that you make known to the said C. D. that he be before the Judges of our said Court of Common Pleas on [*the first day of their next term,*] to show cause why execution should not be had and awarded against him, upon the said judgment so obtained as aforesaid, for damages which the said A. B. hath sustained, by reason of the said further and other breaches of the condition of the said writing obligatory, if it shall seem expedient for him so to do; and further to do, [&c., *as in No. 1, ante, 1101.*]

17. *The like, on Official Bonds.**

The State of Ohio, — county, ss.

To the Sheriff of said county, Greeting :

Whereas, *John Stiles*, heretofore, to wit: on the — day of —, A. D. —, in our Court of Common Pleas within and for the county of —, by

(a) Any person injured by the misconduct of an executor, administrator, or other officer, may put his official bond in suit and recover judgment for the penalty; and any other person injured may afterwards sue out a *Scire Facias* upon the judgment; Swan's Stat. 162, ante.

To revive Judgment Affirmed by the Supreme Court.

the judgment of the same court, recovered against C. D. a certain debt of — dollars, and also — dollars for his damages which he had sustained by reason of the detaining of that debt, and also — dollars for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. was convicted, as by the record and proceedings thereof remaining in our Court of Common Pleas aforesaid mainfestly appears: And afterwards, to wit: on the [date of the *Scire Facias*,] — day of — A. D. —, *Thomas Nokes*, by E. F. his attorney, comes into our said court here, and according to the form of the statute in such case made and provided, gives the same court here to understand and be informed, that the said debt, so by the said *John Stiles* recovered as aforesaid, and which he avers still remains in full force and effect, in no wise set aside, reversed, paid off or satisfied, was and is a certain penal sum of — dollars, mentioned in a certain writing obligatory, made the — day of —, A. D. — at —, sealed with the seal of the said C. D., and bearing date the day and year last aforesaid, a certified copy whereof the said *Thomas Nokes* now brings here into court, by which said writing obligatory, reciting, [&c.] it is provided, [&c., setting out so much of the condition as is necessary for assigning the further breaches,] and the said *Thomas Nokes* also gives our said court here to understand and be informed, that the writ of him, the said *John Stiles*, in the said action against the said C. D., in which he obtained such judgment as aforesaid, was sued out of the office of the clerk of the court aforesaid, on the — day of — A. D. —; and that the said action was brought and commenced upon and for a certain breach of the condition of the said writing obligatory by the said C. D. before the suing out of the writ aforesaid by the said *John Stiles*: And the said *Thomas Nokes*, for further and other breaches of the condition of the said writing obligatory, according to the form of the statute in such case made and provided, gives our said court here to understand and be informed, [&c., assigning further breaches, see ante 734,] which said several breaches of the conditions of said writing obligatory so assigned, the said *Thomas Nokes* doth aver and give our said court here to understand and be informed, are further and other breaches than the breaches for and by reason of which the said *John Stiles* obtained the said judgment so by him recovered as aforesaid: And for which said further and other breaches the said *Thomas Nokes* hath besought us to provide him also a proper remedy: An we being willing, [&c., conclude as in the last form, using the name "*Thomas Nokes*," instead of "*A. B.*"]

18. *Scire Facias* after a Judgment of the Common Pleas affirmed in the Supreme Court and Mandate sent down.

Commence as in No. 1, ante 1101,] — Whereas, A. B. lately, [&c.] — recovered, [&c. — stating the original judgment,] whereof the said C. D.

To make Defendants "not found" parties to the Judgment.

is convicted, as by the inspection of the record and proceedings thereof, which we lately caused to be brought into our Supreme Court within and for the said county of — by virtue of our certain writ of error prosecuted by the said C. D. of and upon the premises, and which now remains in our said Supreme Court in all things affirmed, appears to us of record; and also — dollars, which in our said Supreme Court afterwards, to wit, at the — term thereof, A. D. —, were adjudged to the said A. B. according to the statute in such case made and provided, for his damages, costs and charges which he had sustained by reason of the delay of execution of the judgment aforesaid, on pretence of prosecuting our said writ of error, by the said C. D., whereof the said C. D. is also convicted, as appears to us of record; and whereas, for having execution of the judgment aforesaid, our special mandate was sent down by our Supreme Court aforesaid, to our said Court of Common Pleas, according to the form of the statute in such case made and provided, as also appears to us of record: And now on the behalf of the said A. B., in our said Court of Common Pleas, we have been informed, that although judgment be thereupon given and affirmed, and a mandate sent down in form aforesaid, which he avers still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied, yet execution of that judgment still remains to be made to him; wherefore the said A. B. hath besought us to provide him a proper remedy in this behalf: And we being willing, [&c.] command you, [&c.] to show, [&c.] why the said A. B. ought not to have his execution against him, of the [damages,] costs and charges aforesaid, according to the force, form and effect of the recovery and adjudication aforesaid, if it shall seem, [&c. as in No. 1, ante 1101.

19. *Scire Facias to make Defendants, not served with Original Process, parties to the Judgment.*

The State of Ohio, — county, ss.

To the Sheriff of the county of — : * Greeting:

Whereas, A. B., lately, in our Court of Common Pleas within and for the said county of —, to wit, at the — term thereof, A. D. —, by our certain writ of *summons*, impleaded C. D., E. F. and G. H., in a plea of [trespass on the case, *or, as the plea is,*] declaring in the same plea against them, (the sheriff having returned the said writ of *summons*, Not found as to the said E. F. and G. H.;) for that, whereas, [&c., *here recite the declaration,* to the damage of the said A. B. of — dollars, as he said, and therefore he brought his suit, &c.] And such proceedings were thereupon had in our said Court of Common Pleas, that afterwards, to wit, on — the said A.

(a) The county where the defendants, to be made parties, reside; Swan's Stat. 658. In general, however, a *scire facias* cannot issue to another county. Wright, 116.

Against Sureties of Sheriff, on Amercement.

B. by the judgment of the same court, recovered against the said C. D. — dollars for his damages on occasion of the premises, and — dollars for his costs and charges by him about his suit in that behalf expended, as to us appears of record. And now, on behalf of the said A. B. in our said Court of Common Pleas, we have been informed that the said judgment thereupon given, in form aforesaid, still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied; wherefore the said A. B. hath besought us to provide him a proper remedy against the said E. F. and G. H. in this behalf. And we being willing that what is just in this behalf should be done, command you that you make known to the said E. F. and G. H. that they and each of them be before the Judges of our said Court of Common Pleas, on [the first day of their next term,] to show, if they have or know, or if either of them hath or knoweth of any thing to say for themselves, or himself, why they and each of them should not be made parties defendants to the judgment aforesaid, and why execution should not issue thereupon against them and each of them, according to the statute in such case made and provided; if it shall seem expedient for him so to do; and further to do, [&c., as in No. 1, ante, 1101.

20. *The like, to make the Sureties of a Sheriff parties to a Judgment of Amercement.*

The State of Ohio, — county, ss.

To the Coroner of said county — Greeting :

Whereas, lately, in our Court of Common Pleas within and for the county of —, to wit, at the — term thereof, A. D. —, A. B., by his certain motion then made to the same court, impleaded C. D., late sheriff of the county of —, for that the said C. D., sheriff as aforesaid, [refused, &c., setting forth the charges against the sheriff,] and such proceedings were thereupon had in our said Court of Common Pleas, that afterwards, to wit, on —, the said A. B., by the consideration of the same Court, recovered against the said C. D., sheriff as aforesaid, a judgment of amercement for — dollars [debt, and — dollars] damages, and — dollars penalty, together with — dollars, his costs in that behalf expended, according to the statute in such case made and provided, as to us appears of record. And afterwards, to wit, on the [date of the scire facias] — day of —, A. D. —, the said A. B., by S. his attorney, comes into our said court here, and according to the form of the statute in such case made and provided, gives the same court here to understand and be informed, that the said C. D., as principal, and E. F. and G. H., as his sureties, by their certain writing obligatory made the — day of —, A. D. —, sealed with their seals and bearing date the day and year last aforesaid, a certified copy whereof the said A. B. now brings here into court, by which said writing obligatory, reciting, [&c.,] it is provided, [&c.,

To make co-obligors parties to a Judgment Confessed.

setting out the condition,] and the said A. B. also gives our said court here to understand and be informed that the said judgment of amercement in form aforesaid given, still remains, [*&c.;*] wherefore, [*&c., conclude as in the last form.*

21. *The like, to make Persons, jointly liable, Parties to a Judgment Confessed.**

The State of Ohio, — county, ss.

To the Sheriff of said county — Greeting:

Whereas, A. B., lately, to wit, at the — term of our Court of Common Pleas within and for the said county of —, came into our said court, and without process, impleaded C. D. in a plea of [*assumpsit, &c., or, as the plea is,*] declaring in the same plea against him; for that whereas, [*&c., here recite the declaration,* to the damage of the said A. B. of — dollars, as he said, and therefore he complained, &c.] And thereupon the said C. D. afterwards, to wit, on the — day of —, A. D. —, appeared in our said court, without process, and said he could not deny but that he [*did assume and promise, reciting the confession according to the record,* in manner and form as the said A. B. had complained against him, and confessed that the said A. B. had sustained damages by reason of the premises, to — dollars;] and afterwards, to wit, on the same day and year last aforesaid, by the judgment of the same court, the said A. B. recovered against the said C. D. the said sum of — dollars, his [*damages,*] so confessed by him as aforesaid, and also — dollars, for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. was convicted, as by the record and proceedings thereof, remaining in our Court of Common Pleas aforesaid, manifestly appears. And now, at this day, to wit, on the [*date of the scire facias*] — day of —, A. D. —, the said A. B., by E. F. his attorney, comes into our said Court of Common Pleas, and according to the form of the statute in such case made and provided, gives the same court here to understand and be informed, that the said [*damages*] so by him recovered as aforesaid, was and is a certain sum of — dollars, and interest thereon, mentioned in a certain [*promissory note*] bearing date the — day of —, A. D. —, for the sum of — dollars, payable to the said A. B. or order, in — days after date, which period had then elapsed, and executed by the said C. D. jointly [*or, jointly and severally*] with J. S. and J. N. And the said A. B. also gives our said Court here to understand and be informed, that the said judgment thereupon given, in form aforesaid, still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied; wherefore the said A. B. hath besought us to provide him a proper remedy against the said J. S. and J. N. in this behalf, [*&c., conclude as in No. 19, ante, 1101.*

The like, Judgment on Appeal — Surviving Plaintiff against Adm'r of co-defendant, dec'd.

22. *The like, to make persons, jointly liable, Parties to a Judgment in the Common Pleas on Appeal from a Justice of the Peace.*

The State of Ohio, — county, ss.

To the Sheriff of said county — Greeting :

Whereas, A. B., lately, to wit, on —, before S. S., esquire, a justice of the peace within and for the county of —, recovered a certain judgment against C. D. for the sum of — dollars damages, and — dollars costs of suit, from which judgment the said C. D. took an appeal to our Court of Common Pleas within and for the county aforesaid; and afterwards the said A. B. in the same court complained against the said C. D. in a certain plea of [assumpsit;] for that whereas, [&c., *here recite the declaration*, to the damage of the said A. B. of — dollars, as he said; and therefore he brought his suit, &c.] And such proceedings were thereupon had, in our said Court of Common Pleas, that afterwards, to wit, on —, the said A. B. by the judgment of the same court, recovered against the said C. D. — dollars damages, on occasion of the premises, and — dollars for his costs and charges by him about his suit in that behalf expended, as to us appears of record. And now, at this day, [&c., *conclude as in the last form*.]

23. *Scire Facias, by a Surviving Plaintiff against the Administrator of a Joint Defendant who died pending the Suit.**

The State of Ohio, — county, ss.

To the Sheriff of said county — Greeting :

Whereas, A. B. and C. D. lately in our Court of Common Pleas within and for the county of —, to wit, at the — term thereof, A. D. —, by our certain writ of summons, impleaded E. F., G. H. and J. S. in a plea of [trespass on the case, &c., or, *as the plea is*,] declaring in the same plea against them; for that whereas, [&c., *here recite the declaration*, to the damage of the said A. B. and C. D. of — dollars, as they said; and therefore they brought their suit,] &c.; and afterwards, and before plea pleaded, the said C. D. died,

(a) Swan's Stat. 689, § 86. Where in an action on a bond against four defendants, one of them dies, and the suit proceeds to judgment against the survivors; in a *Scire Facias* to make the representative of the deceased a party, it is sufficient to set forth the substance of the bond; and under the plea of *non est factum*, with notice of special matter, it is not necessary for the plaintiff to produce the record of the judgment,

or show a breach of the condition: 5 Ohio Rep. 340. In such case, *non est factum* does not tender an immaterial issue: but whether, under the notice attached to that plea, the defendant can give in evidence matters that transpired before the commencement of the suit — *Quere; Ib* — But in such case damages are not to be assessed anew: They are to be considered as liquidated in the original action; *Ib*.

By Husband and Wife.

and the said A. B. survived him, to wit, on, [&c.,] whose death afterwards, at the — term of said court, A. D. —, was suggested on the records of the same court, in due form of law, and thereupon the said E. F., G. H. and J. S., pleaded in bar of the action aforesaid: That, [&c., *here recite the plea,*] and of this they put themselves upon the country, [&c.;] and afterwards, and before the trial of the issue joined between the parties, the said J. S. died intestate, leaving the said E. F. and G. H., his survivors, and administration of all and singular the goods, chattels and credits, which were of the said J. S. at the time of his death, by the court of — was granted to W. S. in due form of law, as by the information of the said A. B., in our Court of Common Pleas aforesaid, we have been given to understand; and afterwards, at the — term of said court, A. D. —, the death of the said J. S. was suggested on the records of the same court, in due form of law; and thereupon, at the [same] term of the court aforesaid, and by the judgment of the same court, the said A. B., survivor as aforesaid, recovered against the said E. F. and G. H., survivors as aforesaid, — dollars for his [damages,] on occasion of the premises, and — dollars for his costs and charges by him about his suit in that behalf expended; as to us appears of record: And now, on the behalf of the said A. B., survivor as aforesaid, in our said Court of Common Pleas, we have been informed, that the said judgment thereupon given, in form aforesaid, still remains in full force and effect, in no wise set aside, reversed, paid off or satisfied: Whereupon the said A. B., survivor as aforesaid, hath besought us to provide him a remedy against the said W. S., administrator of the said J. S. in this behalf: And we being willing, [&c., *as in No. 14, ante, 1106, using the words "survivor" and "survivors."*]

24. Scire Facias by Husband and Wife on a Judgment recovered by the Feme dum Sola.

Commence as in No. 1, ante 1101. Whereas A. B. lately, [&c.,] recovered, [&c.,] wherefore the said C. D. is convicted, as appears to us of record; and afterwards, to wit, on, [&c.] at, [&c.] the said A. B. intermarried with and took to husband E. F., as by the information of said E. F. and A. his wife, in our said Court of Common Pleas, we have been given to understand; And now on the behalf of the said E. F. and A. his wife, we have been informed that although judgment be thereupon given, which they aver still remains in full force and effect, in no wise set aside, paid off or satisfied: yet execution of the [damages] and costs aforesaid still remain to be made to them: Wherefore, [&c., *as in No. 1, ante 1101.*]

Against Husband and Wife — Against Special Bail.

25. *The like against Husband and Wife upon a Judgment recovered against the Feme dum Sola.*

Commence as in No. 1, ante, 1101.] Whereas A. B. lately, [&c.,] recovered, [&c.,] against C. D., [&c.,] whereof the said C. D. is convicted, as appears to us of record; and afterwards the said C. D. intermarried with and took to husband E. F.; And now on the behalf of said A. B., [&c., *as in last form.*

26. *Scire Facias against Special Bail.*

The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting:

Whereas E. F. and G. H. heretofore, to wit, on — in their own proper persons appeared before, [&c., *naming the officer who took the bail,*] and severally acknowledge themselves to owe unto A. B. the sum of — dollars upon the condition that if C. D. should happen to be convicted, at the suit of the said A. B., in a certain action of [assumpsit,] then lately commenced and depending in the same Court, by and at the suit of the said A. B. against the said C. D., then he, the said C. D., should pay the costs and condemnation of the Court or be rendered or render himself into the custody of the Sheriff of said county, for the same, or in case of failure, then the said E. F. and G. H. should pay the costs and condemnation aforesaid for the said C. D., as by the record of the said recognizance still remaining in our said Court of Common Pleas more fully appears: And although the said A. B. afterwards, to wit, on — in our said Court of Common Pleas, and by the judgment of the same Court, recovered in the action aforesaid against the said C. D. — dollars for his [damages] by reason of [the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B.,] and also — dollars for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, as by the record and proceedings thereof still remaining in our said Court of Common Pleas more fully appears; yet the said C. D. hath not paid or satisfied the said [damages] and costs or any part thereof, to the said A. B., or rendered himself, nor hath been rendered, into the custody of the Sheriff of said county, for the same, according to the form and effect of the said recognizance; and as well the said recognizance as the said judgment, still remain in full force and effect, in no wise set aside, reversed, paid off or satisfied; as we have received information from the said A. B. in our Court of Common Pleas aforesaid; [*here over the issuing of execution and return;*] wherefore the said A. B. hath besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you that you make known to the said

(a) See ante 450, and 448 note.

On Justice's Judgment to charge Real Estate.

E. F. and G. H. that they be before the Judges of the said Court of common Pleas on [the first day of their next term] to show, if they have or know, or if either of them hath or knoweth, of any thing to say for themselves, or himself, why the said A. B. ought not to have execution against the said E. F. and G. H. for the [damages] and costs aforesaid, according to the force, form and effect of the said recognizance, if it shall seem expedient, [*&c. as in No. 1, ante, 1101.*]

27. *Scire Facias to subject Real Estate to the payment of Justice's Judgment.*^a

The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting :

Whereas A. B. lately, to wit, on — before S. S., Esquire, a Justice of the Peace within and for the county of —, recovered a certain judgment against C. D. for the sum of — dollars [damages] and — dollars costs of suit ; and the said C. D. issued an execution upon the said judgment, in due form of law ; and the same was returned, No goods found whereon to levy ; and afterwards it was suggested to the said S. S., Esquire, Justice of the Peace as aforesaid, that the said C. D. is possessed of lands and tenements ; as by the inspection of a transcript of the record and proceedings thereof lately filed in our said Court of Common Pleas, appears to us of record : And now on the behalf of the said A. B. in our said Court of Common Pleas, we have been informed, that the said judgment thereupon given, in form aforesaid, still remains in full force and effect, in no wise set aside, reversed, paid off or satisfied, and that execution still remains to be made to him thereupon of the goods and chattels, lands and tenements of the said C. D., wherefore the said A. B. hath besought us to provide him a proper remedy in this behalf : And we being willing that what is just in this behalf should be done, command you that you make known to the said C. D. to be before the Judges of our said Court of Common Pleas on — to show, if he has or knows of any thing to say for himself, why execution ought not to issue against his goods and chattels, lands and tenements, to satisfy said judgment, and costs ; if it shall seem expedient, [*&c., as in No. 1, ante, 1101.*]

(a) A *Scire Facias* cannot issue from the Common Pleas to subject lands to sale on the judgment of a justice of the peace, unless the justice's transcript shows that an execution was returned, "no goods," and a suggestion made that the defendant owned lands; *Edmiston v. Edmiston*, 2 Ohio Rep. 251. Nor can it issue to another county; *Wright*, 442. On a *Scire Facias* to subject real estate to a justice's judg-

ment, it need not appear that the constable retained the execution in his hands 30 days: Execution in such case may be awarded without taking a rule on the defendant to plead, at the return term of the *Scire Facias*. The return of the constable cannot be inquired into. His return is matter of record and conclusive between parties and privies; *Hill v. Kling*, 4 Ohio Rep. 135.

By sureties against the Principal.

28. *Scire Facias by Sureties who have paid the Debt, against the Principal.**

The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting :

Whereas A. B. lately, to wit, on the — day of —, A. D. —, in our Court of Common Pleas within and for the said county of —, by the judgment of the same Court, recovered against C. D., E. F. — dollars, for his damages which he had sustained by reason of the not performing certain promises and undertakings then lately made to the said A. B. by the said C. D. and E. F. ; and also — dollars for his costs and charges by him about his suit in that behalf expended ; whereof the said C. D. and E. F. were convicted, as to us appears of record : And whereas for having execution of the judgment aforesaid, we lately by our writ commanded our Sheriff of the said county of —, that of the goods and chattels, and for want thereof, of the lands and tenements of the said C. D. and E. F. should cause to be made the damages and costs aforesaid, with interest thereon and costs of increase ; and that he should have that money, [*&c., as in the execution ;*] And our said Sheriff of — on — returned to us that by virtue of the said writ to him directed, he had caused to be made of the goods and chattels of E. F. the damages and costs aforesaid, which money he had ready before the Judges of our said Court of Common Pleas at the day and place in the said writ mentioned, to render to the said A. B. in satisfaction of the damages, interest and costs aforesaid : And now at this day, to wit, [*the date of the scire facias,*] the said E. F. comes here into our said Court of Common Pleas, and according to the form of the statute in such case made and provided, gives the same Court here to understand and be informed, that the said damages so by the said A. B. recovered as aforesaid, was and is a certain sum of — dollars, and interest thereon, mentioned in a certain [*promissory note*] bearing date the — day of — A. D. —, for the sum of — dollars, payable to the said A. B. or order, in — days after date, and executed by the said C. D. as principal, and the said E. F. as his surety ; And the said E. F. also gives our said Court here to understand and be informed that although he has been compelled in manner aforesaid to pay the said damages, interest and costs, as surety of the said C. D., yet he, the said E. F., still remains unpaid and unsatisfied thereof by the said C. D. ; wherefore the said E. F. hath besought us to furnish him a proper remedy in this behalf ; And we being willing that what is right in this behalf should be done, command you to make known to the said C. D. to be before the Judges of our said Court of Common Pleas on [*the first day of their next term,*] to show, if he has or knows of any thing to say for himself, why the said E. F. ought not to have his execution against him of the damages, interest, and costs aforesaid, according to the form, force, [*&c., conclude as in No. 1, ante, 1101.*]

Against an Administrator suggesting Waste.

29. *Scire Facias against an Administrator suggesting a Devastavit.**

The State of Ohio, ——— County, ss.

To the Sheriff of said County, Greeting :

Whereas, A. B. lately, to wit, on the ——— day of ———, A. D. ———, in our Court of Common Pleas, within and for the said county of ———, by the judgment of the same court, recovered against C. D., administrator of E. F., deceased, ——— dollars for his damages which he had sustained by reason of the not performing certain promises and undertakings then lately made by the said E. F. to the said A. B., and also ——— dollars for his costs and charges by him about his suit in that behalf expended ; whereof the said C. D., as administrator as aforesaid, was convicted, as appears to us of record. And whereas, for having execution of the judgment aforesaid, we lately by our writ commanded our sheriff of ——— county, that of the goods and chattels which were of the said E. F. at the time of his death, in the hands of the said C. D. to be administered, he should cause to be made the damages and costs aforesaid, with interest thereon and costs of increase ; and that he should have that money, [*&c., as in the execution ;*] And our said sheriff of ——— on ——— returned to us that, by virtue of the said writ to him directed, he had caused to be made of the goods and chattels which were of the said E. F. at the time of his death, in the hands of the said C. D. to be administered, the sum of ——— dollars, parcel of the damages and costs aforesaid, which money he had ready before the judges of our said Court of Common Pleas at the day and place in the said writ mentioned, to render to the said A. B. in part satisfaction of his damages and costs aforesaid ; and that no other or more goods or chattels which were of the said E. F. in his lifetime, could be found in the hands of the said C. D. unadministered, whereof he could cause to be made the residue of the damages and costs aforesaid, or any part thereof, [*or that no goods, &c., could be found, as the fact may be ;*] And although judgment be thereupon given, which he avers still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied, yet execution for ——— dollars, being the [*residue*] of the damages and costs aforesaid, still remains to be made ; And now on this day, to wit, on ——— [*the date of the scire facias,*] in behalf of the said A. B., in our said court of Common Pleas, we have been informed that at the time of the award of the said execution as aforesaid, to wit, on ——— at ———, divers goods and chattels which were of the said E. F. at the time of his death, of great value, to wit, of the value of the damages and costs aforesaid, in form aforesaid recovered, had come to the hands of the said C. D., administrator as aforesaid, to be administered, and which said goods and chattels the said C. D. administrator as aforesaid, afterwards, to wit, on the same day and year last aforesaid, at, [*&c.,*] aforesaid, eloigned,^b wasted, and converted and disposed of to his own use ; Wherefore, the said A. B. hath besought us to provide him a proper remedy in this behalf ; and we being willing that what is just in this

(a) Swan's Stat. 356

(b) As to this averment see 1 Saund. 307.

Against Heirs and Terro-tenants.

behalf should be done, command you that you make known to the said C. D. to be before the judges of our said Court of Common Pleas, on [the first day of their next term,] to show, if he has or knows of any thing to say for himself, why the said A. B. ought not to have execution against him of the damages and costs aforesaid, to be levied of his own proper goods and chattels, according to the statute in such case made and provided; if it shall seem expedient, [*&c.*, conclude as in No. 1, ante, 1101.

30. *Scire Facias against Heirs and Terro-tenants.*

The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting :

Whereas, A. B. lately, to wit, [*&c.*] recovered against C. D. [*&c.*, stating the judgment as in No. 1, ante, 1101;] whereof the said C. D. was convicted, as appears to us of record; And although judgment be thereupon given, yet execution of the [damages] and costs aforesaid, still remains to be made to the said A. B.; and after the giving of the said judgment, to wit, on — at — the said C. D. died intestate, seized in *fee simple* of certain lands and tenements, to wit, [*here set out the metes and bounds,*] whereof E. F. and G. H. are tenants; and leaving A. D. and B. D. his heirs at law, him surviving, and to whom the lands and tenements aforesaid descended; and administration of all and singular the goods, chattels and credits which were of the said C. D. at the time of his death, by the court of —, was granted to J. S. in due form of law; and the said J. S. afterwards closed and settled up his accounts as administrator as aforesaid, with the said court of —; so that in his hands nothing now remains of the goods, chattels, or credits, which were of the said C. D. at the time of his death;^a and the said judgment still remains in full force and effect, in no wise set aside, reversed, paid off, or satisfied;^d as we have received information from the said A. B. in our court of Common Pleas aforesaid; wherefore, the said A. B. hath besought us to provide him a proper remedy in this behalf; And we being willing that what is just in this behalf should be done, command you that you make known to the said heirs at law of the said C. D., and also to the said tenants of the tenements aforesaid, that they be before the judges of our said Court of Common Pleas, on [the first day of their next term,] to show, if they have or know of any thing to say for themselves, why the [damages] and costs aforesaid ought not to be levied of those lands

(c) It was necessary to aver that the personal estate in the hands of the administrator had been exhausted; 2 Ohio Rep. 246; 4 do. 397; 5 do. 512; or, that there were no personal representatives; or, if any, that they had closed

their accounts with the court; 8 Ohio Rep. 209. But see Swan's Stat. 382, § 239; 357, § 109; 673, § 105; 671, § 102; 366, § 150; 46 vol. Stat. 27; 15 Ohio Rep. 301; ante, 1091.

(d) This must be averred: 2 Ohio Rep. 246.

For Restitution.

and tenements, according to the force, form and effect of the recovery aforesaid; if it shall seem expedient, [*&c.*, conclude as in No. 1, ante, 1101.

31. *Scire Facias quare Restitutionem non, after Reversal and Mandate sent down to the Common Pleas.*

The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting :

Whereas A. B. lately impleaded C. D. in our Court of Common Pleas, within and for the county of —, in a certain [plea of trespass, *or, as the case may be,*] and such proceedings were thereupon had in our said Court of Common Pleas that, afterwards, by the consideration and judgment of the same court, the said A. B. recovered against the said C. D. in that plea, — dollars for his [damages,] which he had sustained by reason of certain [trespasses] alleged to have been committed by the said C. D., and also — dollars, for his costs and charges, by him about his suit in that behalf expended; and thereupon, afterwards, the said C. D. brought and prosecuted our certain writ of error in our Supreme Court, within and for the said county of —, for the reversal of the said judgment; and such proceedings were thereupon had in said Supreme Court, that it was considered by the same court that the judgment aforesaid, for certain errors therein by the said C. D. assigned, and for other errors in the record and proceedings being, should be reversed, annulled, and altogether holden for nought, and that the said C. D. should be restored to all things which he had lost by occasion of the said judgment, and recover his costs and charges by him about his suit in that behalf expended: And whereas, for having execution of the judgment aforesaid, our certain mandate was sent down, by our Supreme Court aforesaid, to our said Court of Common Pleas, according to the form of the statute in such case made and provided, as also appears to us of record. And now, on the behalf of the said C. D., in our said Court of Common Pleas, we have been informed that the said A. B. hath had his execution of the [damages] and costs aforesaid, on pretence of the said judgment of our said Court of Common Pleas, and is yet possessed thereof: wherefore the said C. D. hath besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you to make known to the said A. B. that he be before the judges of our said Court of Common Pleas, on [the first day of their next term,] to show, if he hath or knoweth of any thing to say for himself, why the said C. D. ought not to have, as well restitution of the [damages] and costs aforesaid, as execution against him for his costs and charges, so as aforesaid recovered by the said C. D., on occasion of his prosecution of the writ of error aforesaid, according to the form, force and effect of the said judgment of our

How Executed and Returned.

Supreme Court aforesaid, if it shall seem expedient, [*&c.* *Conclude as in 1, ante 1101.*

For the Form of a writ of Restitution, see Error, post.

32. *Alias Scire Facias.*

The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting:

Whereas, [*&c., as in the first writ, inserting these words, after the return of the sheriff, "as before we have commanded you," and altering the teste and return.*

SEC. IV. HOW EXECUTED AND RETURNED.

In general, a writ of scire facias is served in like manner as a summons.^a

Upon a scire facias, however, to subject real estate to a judgment of a justice of the peace, a return of two nihils, if the defendant does not reside or cannot be found in the county, is tantamount to an actual service.^b

So where a scire facias is issued to charge special bail;^c or against the original defendant or his heirs, executors or administrators, to revive a dormant judgment; or where the plaintiff or defendant dies after judgment and before satisfaction, and scire facias is issued to make the representative, real or personal, party to the judgment, upon one writ being returned "scire feci," or two writs "nihil," the party is considered as in court, and may be proceeded against accordingly.^d

But where, after judgment against such of the defendants as were served with process in the original action, a scire facias is issued to make the other defendants, not served, parties to the judgment, the scire facias must be served in like manner as a summons, before the latter can be made parties to the judgment.^e

So, the scire facias must be served in like manner as a summons, where a person is to be made a party to a judgment confessed on a joint liability; or to be made a party to a judgment of the Court of Common Pleas, rendered on an appeal from a justice,^f upon a joint liability.

And where further breaches are to be assigned upon a judgment for a penalty;^g or, where the scire facias is issued to make the sureties of the sheriff parties to an amercement;^h or to charge executors or administrators with waste;ⁱ

(a) See ante p. 115, 116.

(b) Swan's Stat. 5.2 § 121.

(c) Id. 656, § 45.

(d) Swan's Stat. 672, § 108, 105; 46 vol. Stat. 27, 28, 65.

(e) Swan's Stat. 658, § 53.

(f) Id. 660, § 60.

(g) Id. 485.

(h) Id. 356.

Amending—Setting Aside—Pleadings in.

or by bail, to charge their principal;¹ or to make an executor or administrator of a deceased defendant, party to a judgment against the survivor of two or more originally liable,¹ the scire facias must be served in the same manner as a summons.

SEC. V. WHEN AMENDABLE AND WHEN SET ASIDE.

The plaintiff may amend the scire facias, the same as an ordinary declaration, and the amended scire facias need not be sealed or re-issued.² If the scire facias has been irregularly issued, the defendant may on his part move to set it aside.¹ The court, however, will allow it to be amended in the test or venue, and when it misdescribes the judgment.² But the plaintiff cannot perhaps amend by adding new parties who should have been joined when the writ issued.²

SEC. VI. PLEADINGS IN SCIRE FACIAS.

No declaration being required to be filed upon the scire facias, the defendant pleads to the writ, in the same manner as to a declaration. The scire facias must, therefore, contain everything necessary to constitute a good declaration;² and the pleadings on scire facias, are governed by the same rules as in other cases.

The defendant, to a scire facias on a judgment, may plead nul tiel record of the recovery,³ or payment, or a release, or that the debt or damages were levied on a fi. fa., or the defendant's person taken in execution on a ca. sa.⁴ But the defendant cannot plead any matter which he might have pleaded to the original action.⁵ This rule, however, applies only to the original parties or to privies, and not to strangers.⁶

The defendant will not be permitted to plead anything contrary to the title on which the recovery was obtained, or which shows the judgment only erroneous and voidable.¹

The issue in scire facias is produced in the same way, (by demurrer or traverse,) as in ordinary cases.

- (i) Swan's Stat. 879.
- (j) Id. 669.
- (k) 18 Wend. 526; 43 vol. Stat. 114.
- (l) 1 Howard, 167; 18 Wend. 526.
- (m) 9 East. 316.
- (n) 22 Wend. 608. See as to amendment of process &c., generally, ante p. 843.
- (o) 2 Ohio Rep. 240, 345; 4 Ohio Rep. 397;

- 5 Ohio Rep. 512; 1 Paine 652; 2 Bur. Prac. 170.
- (p) 2 Tidd's 1130.
- (q) 2 Tidd. 1130; 12 Mass. 268.
- (r) 4 Cowen. 457; 4 Mass. 218; Cowp. 728;
- 8 Johns. Rep. 77.
- (s) 4 Cowen. 457.
- (t) Com. Dig. Pl. (3 L.) 10.

Pleas.

SEC. VII. FORMS OF PLEAS IN SCIRE FACIAS.

1. *Nul tiel Record.*

C. D.	} Sci. Fa.
ads.	
A. B.	

And the said C. D. comes and defends, &c., and says, that the said A. B. ought not to have his execution against the said C. D. for the [damages,] costs, and charges aforesaid, because he says,* that there is no such record of recovery against him, the said C. D., at the suit of the said A. B., in manner and form as the said A. B. hath complained against him; and this he is ready to verify: Wherefore, he prays judgment if the said A. B. ought to have his execution aforesaid, &c.

By T., his Attorney.

2. *Payment.*

*Proceed as in No. 1, to the **] — That the said C. D. after the recovery of the judgment aforesaid, and before the issuing of the said writ, to wit, on — paid to the said A. B. the sum of — dollars in full satisfaction and discharge of the said judgment; and this, [&c., conclude as in No. 1.

3. *Death of Principal before return of Ca. Sa.*

*Proceed as in No. 1, to the *,]* — That the said E. F. in the said judgment mentioned, before the issuing of the said first writ of *Scire Facias*, and before the return of any writ of *capias ad satisfaciendum* against him, died, to wit, on — at — and this, [&c., conclude as in No. 1.

4. *Plea to a Scire Facias for Costs against Securities that the Summons was not indorsed until after suit was brought.*^b

And for [a further] plea in this behalf, the defendants say, that the plaintiffs ought not to have and maintain their aforesaid action of *Scire Facias* thereof against them, because they say, that the said H. T., at whose instance said writ of summons was issued, and against whom said judgment was rendered, was at the time of the issuing and return thereof, and for a long time thereof

(b) This plea was held good; 6 O. R. 426. ed on the journal of the court, a *scire facias* can be sustained. 18 Ohio Rep. 246.

6. *Judgment of Revivor, on Default.*

A. B. }
 v. }
 C. D. } In Scire Facias.

This day came the said A. B., by E. F. his attorney, and the said C. D., though solemnly called, came not, but made default:* Therefore it is considered, [&c. *Conclude as in No. 1, ante, 1124.*

7. *The like, against an Executor or Administrator on Default.*

*Proceed as in the last Form to the *:]* Therefore it is considered, [&c. *Conclude as in No. 3, ante 1124.*

8. *Judgment by Default making Defendants, not served with process, Parties to the Original Judgment.*

*Proceed as in No. 6, to the *:]* Therefore it is considered, [&c. *Conclude as in No. 5.*

9. *The like, by Default, on suggestion of further Breaches after Judgment on Penal Bond.*

*Proceed as in No. 6, above, to the *:]* Therefore it is considered, [&c. *Conclude as in No. 4, ante 1125.*

10. *The like, by Default, subjecting Real Estate to the payment of a Justice's Judgment.*

*Proceed as in No. 6, above, to the *:]* Therefore it is considered, that the said A. B., upon the judgment aforesaid, have his execution against the said C. D. of the [damages] and costs aforesaid, with interest thereon, according to the statute in such case made and provided; and also, that the said A. B. recover against the said C. D. — dollars, his costs in this behalf expended.

Judgment for Defendant.

11. *Judgment for Defendant.*

Enter the plaintiff's default, or the finding of the court or jury in favor of the defendant :] Therefore it is considered, that the defendant go hence without day, and recover against the said A. B. — dollars, his costs in this behalf expended.

CHAPTER XXXVII.

SETTING ASIDE PROCEEDINGS FOR IRREGULARITY AND AMENDMENT.

SEC. I. SETTING ASIDE PROCEEDINGS FOR IRREGULARITY.

It is an established rule of all courts, that any proceeding of either the parties, at any stage of the action, which is not according to the common course of the practice of the court, will be set aside as irregular, without regard to merits, on the application of the opposite party ; provided the application be made in proper season.^a

Some illustration of this rule will be here given :

1. An irregularity in practice may be defined to be the want of adherence to some prescribed rule, or mode of proceeding ; and it consists in either omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time, or improper manner.^b

If any necessary proceedings have been omitted by the plaintiff, his next subsequent proceeding may be set aside for irregularity. Thus, if a plaintiff enter a judgment for want of a plea, without filing a declaration, the judgment will be set aside.

If any necessary proceeding on the part of the plaintiff, be not had within the time limited for it, or be had before the time appointed for it, by the practice of the court, in may be set aside for irregularity. Thus, if judgment be entered for the want of a plea, before the time for the pleading has expired, the court will set aside the judgment. So, if process be served after it is returnable, the court will set aside the service.^c

2. If any necessary proceeding be informal, or not done in the manner prescribed by the practice of the court, it may be set aside for irregularity. Thus if an execution be without a seal or materially defective in form, or be executed on Sunday, the court will set it aside or order the goods seized under the writ, or the produce of them, to be returned to the defendant.^d

If any proceedings are not warranted by the particular circumstances of the case, according to the practice of the court, or for which there is no founda-

(a) 2 Caines Rep. 45 ; 10 Wend. 568.

(b) Tidd. 512.

(c) 2 Arch. Pr. 226.

(d) 2 Archb. Pr. 227.

What are Irregularities, and how waived.

tion ; as if judgment be taken by default when there is a plea in, the court will set aside the proceedings.*

The motion to set aside proceedings for irregularity, must be made at the first term after the irregularity has taken place, and in general before any other proceedings have been had in the cause by the party complaining of it ; unless he were ignorant of the irregularity ; in which case, he must apply as soon as he has knowledge of it. But in such case he must show due diligence in informing himself of it, otherwise the motion will not be granted.^a For, if the party, being aware of the irregularity, overlook it, and take subsequent steps in the cause ; or, where, after being fully put on inquiry, he neglects to inform himself of the irregularity, it is a waiver of the irregularity, on his part, and he cannot afterwards take advantage of it.^b Thus, the plaintiff amends his declaration, and the defendant would have the right to plead anew ; but if he goes to trial without pleading over to the amended declaration, his plea shall stand as to the amended declaration.^c So, after verdict a similitur, or none at all is well enough.^d So pleading to the merits is, it seems, admission of capacity in the plaintiff to sue.^e

But when the proceeding is completely defective and void, the defect is not waived by any delay, or any subsequent proceedings of the opposite party.^f— Thus, where the defendant pleaded in abatement, without affidavit annexed to his plea, and then took judgment for want of a replication, it was held that the judgment was irregular, and that the irregularity was not waived by the plaintiff paying the costs of the judgment. So, when the process is served on Sunday, it is void to all intents, and cannot be waived.^g

The court will impose such terms on the party moving to set aside the proceedings, as they may deem just. Thus, where the irregular proceeding appears to have been taken in good faith, and, in consequence of the proceeding, an action for false imprisonment or trespass will technically lie, the court will require the party to stipulate not to bring the action ;^h or, if already brought, he will be required to discontinue it upon the payment of costs.ⁱ

Journal Entry setting aside Proceedings for Irregularity.

A. B. }
v. } In Assumpsit.
C. D. }

[On filing affidavits in this cause, and] on motion of C. D. by Mr. H., his

- (e) Arch. N. P. 410, 411.
- (f) 2 Arch. Pr. 255 ; Arch. N. P. 414, 415 ; 10 Wend. 560 ; 10 Johns. 486.
- (g) 1 Tidd. 513, 562 ; 4 Cowen 91 ; 5 Id. 446 ; 3 Caines Rep. 107 ; 6 Hill 17.
- (h) Tidd. 562 ; 2 B. & P. 110.
- (i) 1 Pet. 165 ; 1 Blackf. 30.
- (j) 5 Ohio Rep. 56, but as to foreign corporations see 12 Ohio Rep. 132.
- (k) Tidd. 515 ; 1 Chitt. Rep. 400 ; 3 East. 155.
- (l) 1 H. Bl. 628.
- (m) 3 Johns. 257.
- (n) 4 Cowen 49 ; and see 1 Chitt. Rep. 134, note ; 5 Hill, 242 ; 1 B. & Ad. 375.

After Judgment — What defects supplied by Intendment, &c.

attorney, [and after hearing the counsel of A. B. in opposition thereto,] ordered that [the default entered in this cause and all subsequent proceedings therein, or, the fieri facias issued in this cause, or, the judgment entered herein; *stating the subject matter of the irregularity,*] be and the same is hereby set aside for irregularity.

Amendment.

The law relating to the allowance of amendments of process, pleading, &c., before verdict;^o and of the amendment of a judgment;^p and the return to an execution;^q has been already stated.

The only subject, therefore, to be alluded to here, is defects and amendments of the record.

By the common law, where there is any defect, imperfection or omission, in any pleading, whether in substance or in form, which would have been a fatal objection, upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which, it is not to be presumed that either the court would direct the jury to give the verdict, or the jury would have given it, such defect, imperfection or omission, is cured by the verdict at common law; or, in the phrase used in the old law books, it is not a *jeofail*, after verdict, and will be supplied by intendment.^r

This common law rule is recognized by our courts, and, substantially, by statute;^s for it is provided, "that no process, return, pleading or other proceeding in civil cases, shall be abated, arrested, quashed or reversed, for mere want of form, but judgment shall be given according to the right and justice of the case, as the matter in law shall appear to the court, without regarding any defects or want of form in such process, return, pleading, or other proceedings, except such only as the party shall set down and express with his demurrer as the cause thereof; and the court, either before or after demurrer filed, and at any time before writ of error brought, may allow either party to amend, upon such terms as may be just and right; and the supreme court may, on like terms, permit either party to a judgment, or other proceedings brought before it by writ of error or certiorari, to amend such formal defect, in the same manner as the court where the judgment was originally rendered, might have done, before writ of error brought."^t

So far as respects the form of the action, and the declaration and pleadings, there seems to be no occasion to amend formal defects therein, for it is provided by the statute of March 12, 1844,^u that judgment shall not be arrested, or writ of error allowed in the Court of Common Pleas or Supreme Court, on account of any objection to the form of the action in which the plaintiff may have de-

(o) Ante, p. 843.

(p) Ante, p. 999.

(q) Ante, p. 1055.

(r) 1 Saund. 228, n. 1; 2 Arch. Pr. 261.

(s) 42 vol. Stat. 72, § 2.

(t) Swan's Stat. 687.

After Judgment — What defects supplied by Intendment

clared, or on account of any technical objection to the declaration, or other part of the pleadings, in case the facts are substantially alleged, which the party was bound to prove on the trial, in order to entitle him to a recovery.

It will be observed that these statutes cure defects and omissions in matters of form, but not those of substance. Thus, if the plaintiff in his declaration, either state a defective title, or totally omit to state any title or cause of action whatever, a verdict will not cure the defect, either at common law or under the statutes.¹ But a defect arising from want of form, (as wanting time or circumstances,) may be aided by the defendant's plea.² So, a variance between the writ and declaration may be aided by the defendant's plea.³

Defects in pleas, replications, rejoinders, &c., are aided in the same cases as declarations; that is, formal defects in the plea will be aided by the replication — and formal defects in the replication, by the rejoinder, &c.⁴ And pleas, replications, &c., after verdict for the party who pleaded them, are aided by intendment, in like manner as declarations.⁵

We have already seen in the preceding section how a previous irregularity may be cured by the acts of the parties.

In practice, an amendment is seldom asked for, or needed, after judgment or writ of error brought; for, few, if any formal defects, can be taken advantage of on writ of error.

As to amendments, generally, the following is the usual form of the journal entry:

A. B. }
v. } In [Assumpsit.]
C. D. }

On motion of the [plaintiff] leave is given him to amend; [*here state in what the amendment consists, as thus:* to amend his declaration, by inserting in the blank at the end thereof, the amount of damages stated in the præcipe and writ; *or*, to file an amended declaration herein, within — days; *or*, to add common counts to his declaration within — days.] And it is ordered, that the [plaintiff] pay the costs which have accrued herein, since the said defective pleading was filed, taxed to — dollars, within — days.

(t) 2 Doug. 679; 1 Saund. 136, 137, a; 11 Wend. 374; 2 Arch. Pr. 269.

(u) Com. Dig. Pleader, C. 32, 85.

(v) 12 Johns. 430; 1 Cowen, 601.

(w) Arch. Pl. 240 a. 262, 269.

(x) Arch. Pl. 211.

CHAPTER XXXVIII.

WRITS OF ERROR AND PROCEEDINGS THEREON.

SECTION I. NATURE OF THE WRIT.

II. FROM WHAT COURTS IT MAY BE ISSUED.

III. IN WHAT CASES IT LIES.

1. Generally, for errors in law.
2. As to parties.
3. Service of process in the original action.
4. Errors in the pleadings below.
5. Errors in the admission and rejection of evidence.
6. The charge of the court.
7. The verdict.
8. The judgment.
9. Errors in other proceedings in the cause.

IV. BY AND AGAINST WHOM TO BE SUED OUT.

V. WHEN AND WITHIN WHAT TIME THE WRIT MAY BE SUED OUT.

VI. THE ISSUING, SERVICE AND RETURN OF THE WRIT, (SUPREME COURT TO THE COURT OF COMMON PLEAS.)

1. Præcipe for the writ.
2. Form of the writ of error.
3. The service of the writ; how executed by the clerk of the Court of Common Pleas, and form of return thereon.

VII. SUPERSEDIAS, AND PROCEEDINGS TO OBTAIN THE SAME; WITH FORMS.

1. In what cases supersedias bond required.
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VIII. NOTICE AND CITATION, AND SERVICE THEREOF.

IX. THE ASSIGNMENT OF ERRORS.

X. PLEADINGS IN ERROR.

1. Form of common joinder.
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XI. BRIEF AND ARGUMENT.

XII. JUDGMENT IN ERROR.

1. As to amount, and form.

Nature of the Writ, and from what Court issued.

2. As to costs : see ante, p. 994.
3. Form of judgment of affirmance on default, with penalty.
4. Form of judgment of affirmance on hearing.
5. Form of judgment of affirmance on hearing, without penalty.
6. Judgment of reversal.
7. Form of judgment of reversal and judgment for plaintiff in the Supreme Court.
8. Form of judgment of reversal, and cause remanded by procedendo for final judgment.
9. Form of judgment of reversal in part, and affirmance in part.

XIII. PROCEEDINGS ON JUDGMENT IN ERROR.

1. Mandate from the Supreme Court.
2. Form of mandate on judgment of affirmance.
3. Form of mandate on judgment of reversal.
4. Order of the Court of Common Pleas on mandate from the Supreme Court, with forms.
5. Writ of procedendo, and form thereof.
6. Writ of restitution, and form thereof.

XIV. PROCEEDINGS ON A WRIT OF ERROR FROM THE COURT IN BANK TO THE SUPREME COURT.

XV. ERROR CORAM NOBIS, IN THE COMMON PLEAS.

XVI. ERROR CORAM NOBIS, IN THE SUPREME COURT.

SEC. I. NATURE OF THE WRIT.

A writ of error is a judicial writ, issuing out of the court into which it may by law be made returnable, in the nature as well of a certiorari, to remove a record or the files in a cause from an inferior to a superior court, as of a commission to the judges of such superior court, to examine the record and to affirm or reverse the judgment, according to law.^a In England, the writ is issued from the court of chancery ; but in this State, it is issued by the court authorized by law to review the errors of the inferior tribunal.

SEC. II. FROM WHAT COURTS IT MAY BE ISSUED.

It may be issued as a matter of course, and without allowance, from the Supreme Court to the Court of Common Pleas, to correct the errors of the latter court.^b

(a) 2 Saund 101, n. (1.)

(b) 43 vol. Stat. 80; Swan's Stat. 680, § 120.

In what cases it lies.

The Court in Bank, on allowance when in session, or on allowance by two of the judges of the Supreme Court in vacation, will issue a writ of error to the Supreme Court.^c

Writs of error coram nobis will be issued by the Supreme Court, on allowance, for errors in fact, committed by the same court.^d

Final judgments in the Court of Common Pleas may be examined and reversed or affirmed, for alleged errors in fact, upon a writ of error coram nobis, which is allowed (on cause shown) by the president judge of the proper circuit.^e

No writ of error however can issue, as a matter of course, in any case in which there is, upon the minutes of the court or among the files thereof, a waiver of error by the party seeking such writ of error, or a waiver by his attorney.^f

SEC. III. IN WHAT CASES IT LIES.

1. *Generally for Errors in Law.*

A writ of error lies, when a person is aggrieved by an error in the judgment of the Court of Common Pleas, or Supreme Court, or Court in Bank, provided it be an error in substance which appears in the record, and is not aided at common law or by the statutes of jeofails. In the language of the statute, "final judgments in the courts of Common Pleas may be examined and reversed or affirmed in the Supreme Court holden in the same county, upon a writ of error."^g

Since an appeal no longer lies from the Court of Common Pleas to the Supreme Court, the remedy by writ of error has been extended by the statute already referred to, to motions for a new trial on account of a verdict being against evidence;^h and when a party to a suit alleges an exception to any opinion, order or judgment of the Court of Common Pleas, it may be reviewed on error, as we have already seen.ⁱ So, if a demurrer is overruled and the case proceeds to a jury, and a verdict is rendered against the party that demurred, the opinion of the court on such demurrer may be examined, and the final judgment reversed or affirmed by the Supreme Court on a writ of error.^j

A writ of error cannot issue until final judgment is entered.

It cannot be brought on a nonsuit voluntarily suffered by the plaintiff^k nor, where the party may be relieved on motion.^k

In general, it can only be brought on a judgment, or on an award in the nature of a judgment, given in a court of record, acting according to the course

(c) Swan's Stat. 690, § 153.

(d) 6 Ohio Rep. 518; 43 vol. Stat. 80.

(e) 43 vol. Stat. 80, § 5.

(f) 44 vol. Stat. 34, § 2.

(g) Swan's Stat. 678, sec. 119.

(h) See the Statute, ante p. 902-903.

(i) Ante p. 834.

(j) 18 Wend. 169; 4 Whea. 73;

(k) 9 Wend. 125; 13 Wend. 277; 4 Wend.

179.

In what cases it lies.

of the common law;¹ but where the court acts in a summary manner, or in a new cause, different from the common law, a certiorari, and not a writ of error, lies.²

We have already seen, in the preceding Chapter, that many omissions, defects and imperfections in form, are cured by verdict, and many irregularities

(1) 1 Salk. 263; Bacon's Ab. Error, A.; Wright's Rep. 106, 418, 307; 16 Ohio Rep. 5.

(m) Id.; lb.; 1 Arch. Pr. 230; 2 Saund. 100, 101; 9 Ohio Rep. 142; 3 Ohio Rep. 277, 301; 10 Ohio Rep. 45. See as to certiorari post chap. 6. In the case of *Boyle v. Zacharie*, et. al. 6 Pet. 643, the question arose whether a writ of error would lie, on the ground that a venditioni exponas was irregularly and incorrectly awarded after a writ of injunction had been granted against the judgment. Story, J. in delivering the opinion of the court, says:

The argument to maintain the writ of error has proceeded, in a great measure, upon grounds which are not in the slightest degree controverted by this court. It is admitted that the language in Co. Litt. 288, b. is entirely correct, in stating that "a writ of error lieth when a man is grieved by an error in the foundation, proceeding, judgment or execution" in a suit. But it is added, in the same authority, that "without a judgment or an award in the nature of a judgment, no writ of error doth lie." If, therefore, there is an erroneous award of execution, not warranted by the judgment or erroneous proceedings under the execution, a writ of error will lie to redress the grievance. The question here is not whether a writ of error lies to an erroneous award of execution, for there was no error in the award of the fieri facias. But the question is, whether a writ of error lies on the refusal to quash the auxiliary process of venditioni exponas, upon mere motion. In modern times, courts of law will often interfere by summary proceedings on motion, and quash an execution erroneously awarded, where a writ of error or other remedy, such as a writ of audita querela, would clearly lie. But, because a court may, it does not follow that it is bound thus to act in a summary manner; for in such cases the motion is not granted ex debito justitiæ, but in the exercise of a sound discretion by the court. The relief is allowed or refused, according to circumstances; and it is by no means uncommon for the court to refuse to interfere upon motion, in cases where the proceedings are clearly erroneous, and to put the party to his writ of error or other remedy; for the refusal of the motion leaves every remedy, which is of right, open to him.

In *Brooks v. Hunt*, 17 Johns. Rep. 484, Mr. Chancellor Kent, in delivering the opinion of the court of errors, alluding to this practice, said: "It is not an uncommon thing for a court of law, if the case be

difficult or dubious, to refuse to relieve a party after judgment and execution in a summary way by motion, and to put him to his audita querela." That was a case very similar to the present. A motion was made to the Supreme Court of New York to set aside a fieri facias, on the ground that the party was discharged under the insolvent laws of that state. The court refused the motion; and on error brought, the Court of Errors of New York quashed the writ of error. Mr. Chancellor Kent, on behalf of the court, assigned as one of the grounds of quashing the writ of error, that the rule or order denying the motion was not a judgment within the meaning of the constitution or laws of New York. It was only a decision upon a collateral or interlocutory point, and could not well be distinguished from a variety of other special motions and orders, which are made in the progress of a suit, and which have never been deemed the foundation of a writ of error. A writ of error would only lie upon a final judgment or determination of a cause; and it was never known to lie upon a motion to set aside process. And in the close of his opinion, he emphatically observed, if the case "is to be carried from this court to the Supreme Court of the United States, I should hope, for the credit of our practice, it might be on the audita querela, and not upon such a strange mode of proceeding as that of a writ of error brought upon a motion and affidavit." There are other cases leading to the same conclusion. See *Wardell v. Eden*, 1 Johns. Rep. 531, note. *Wicket v. Creamer*, 1 Salk. 264. *Johnson v. Harvey*, 4 Mass. Rep. 483. *Bleasdale v. Darby*, 9 Price, 600. *Clason v. Shotwell*, 1 Tidd's Prac. 470, 471. Kent's (Chancellor) Opinion, 12 Johns. Rep. 31, 50. Com. Dig. Pleader, 3 B. 12. A very strong case illustrating the general doctrine is that error will not lie to the refusal of a court to grant a peremptory mandamus, upon a return made to a prior mandamus, which the court allowed as sufficient. This was held by the house of lords in *Pender v. Herle*, 3 Bro. Parl. Cases, 505.

We consider all motions of this sort to quash executions, as addressed to the sound discretion of the court; and as a summary relief, which the court is not compellable to allow. The party is deprived of no right by the refusal; and he is at full liberty to redress his grievance by writ of error, or audita querela; or other remedy known to the common law. The refusal to quash is not, in the sense of the common law, a judgment; much less is it a final judgment. It is a mere interlocutory order. Even at the common law error only lies from a final judgment.

In what cases it lies.

in the proceedings may be waived by the acts of the parties. These cannot, of course, be subjects of legitimate inquiry on error.

A misjoinder of counts, some sounding in contract and some in tort, is fatal.^a

Error does not generally lie upon mere matters of practice in the inferior court;^o and if error be committed by a court of last resort, it can be corrected only, by motion or writ of error coram nobis.^p

The error complained of, must appear in the record, and cannot be presumed,^q or otherwise proved. Nothing can be assigned for error which contradicts the record.^r

As a general rule, a party cannot assign that for error which makes to his own advantage.^s It seems that this rule does not apply to errors of the court.^t

There is no rule of law which may not by plea, demurrer or bill of exception, become the subject of consideration and decision upon a writ of error. The following cases, however, are here referred to, as they illustrate the rules which govern courts of error, in deciding upon the questions which are brought before them, and the application of the statutes and the law, referred to in the preceding Chapter.

2. *As to Parties.*

If A. sues before a justice, and on appeal B. declares for the use of A., and obtains judgment, it is error.^u But the omission of junior, in one's name,^v or naming the plaintiff as "J. J. Sigg," or "Strothard & Starky,"^w is not error. But to name the plaintiff "Stapp Lanir & Co.," is error, because it shows that "Stapp Lanir & Co." is not the name of an individual.^x

Where the plaintiffs sue before a justice of the peace in the name of "Jacob Lodge and James Dunkley, trustees of section 16, township 3, range 6, Butler township, Montgomery county," and the defendant pleads over to the merits, the irregularity cannot be reached by error.^y

3. *As to Service of Process in the Original Action.*

If return be made of service, that it was left at the store of the defendant, and judgment be taken by default, it is error.^z But a return that a copy was left at the "residence" of the defendant, instead of "the usual place of residence," as required by statute, is not erroneous.^a

(n) 17 Ohio Rep. 586.

(o) 3 Pet. 445; see 4 Ohio Rep. 135.

(p) 3 Ohio Rep. 19.

(q) 7 Ohio Rep. Part 2, 118; 3 Litt. 14;

Wright Rep. 72, 240; 290, 340, 381, 383, 563, 724.

(r) 1 Str. 684; 2 Ld. Raym. 1411; 1 Wils. 85.

(s) 5 Pick. 213; 11 Mass. 279; 2 Ohio Rep. 343; 13 Ohio Rep. 131; 4 Bibb 180; 2 Bac. Ab. 490; 9 Mass. 532; 8 Co. 39.

(t) 8 Co. 359. 1 Gallis. 26; 2 Cranch. 126.

(u) Wright's Rep. 35.

(v) 11 Wend. 522.

(a) 6 Litt. 209.

(w) 3 Blackf. 322; see 44 vol. Stat. 66, as to partners and companies suing in the name of the firm.

(x) 8 Ohio Rep. 174.

(y) Wright's Rep. 563.

(z) 15 Ohio Rep. 288.

In what cases it lies.

4. *As to Errors in the Pleadings below.*

Where a declaration sets out, "that the defendants were summoned to answer to A. B., who by leave of the court appeared by his next friend," &c., there being no averment of infancy, the plaintiff is presumed to be of age; and the allegation of curatorship may be rejected as surplusage.^a

Error cannot be assigned for duplicity in a replication, after the verdict has found the replication true.^b

If the plaintiff shows a good cause of action in his declaration, although informally and defectively stated, it is no ground for error.^c

Where the pleadings are lost and a trial had before they are supplied;^d or a demurrer is overruled, on *motion*, without joinder in demurrer;^e or there be no pleadings, and the pleadings are waived,^f the judgment will be reversed. But overruling a demurrer without joinder, is not error.^g

Where some of the counts in a declaration are good, and some bad, and there is a general verdict and judgment, or a judgment by default on all, error will not lie; for the court will intend that the damages were computed on the good counts, and not on the bad ones, unless the contrary appear on the record.^h

After judgment, a replication to the country, with a verification improperly added, will be regarded as surplusage.ⁱ

Declaration and judgment by default in *assumpsit*, and writ in debt, has been held erroneous,^j but seems now cured by statute.^k

If an immaterial issue be joined, and a repleader not awarded, it is error.^l

Judgment, while a plea remains on the record without a replication, is erroneous.^m But where there is a mere irregularity, and it appears from the record that a party was not prejudiced by it, he cannot maintain error. Thus, where in replevin the defendant pleaded *non detinet*, and property in himself, and the parties went to trial without any replication to the latter plea, and there was a verdict and judgment for the plaintiff, it was held, that error would not lie at the suit of the defendant; for the second plea was virtually tried on the issue under the first plea, and it appeared from the record that the party was not prejudiced by the irregularity.ⁿ

Motions to amend pleadings are addressed to the sound discretion of the court; and unless that discretion be abused, or some rule of law be violated, the Supreme Court do not disturb the orders of the Common Pleas on error.^o

(a) 5 Ohio Rep. 227.

(b) 3 Ohio Rep. 368.

(c) 14 Ohio Rep. 127; 42 vol. Stat. 72, sec. 2.

(d) Wright's Rep. 368.

(e) 2 Ohio Rep. 21.

(f) 5 Ohio Rep. 277; 12 Ohio Rep. 112.

(g) 17 Ohio Rep. 16; 2 Blackf. 61.

(h) 12 Ohio Rep. 10; 13 Ohio Rep. 200; Wright, 568, 673, 258.

(i) Wright's Rep. 382.

(u) Wright's Rep. 574.

(j) 42 vol. Stat. 72, sec. 2.

(k) 14 Ohio Rep. 204.

(l) 6 Ohio Rep. 521.

(m) 12 Ohio Rep. 112.

(n) 3 Ohio Rep. 269; 4 Ohio Rep. 64, 420;

In what cases it lies.

5. *As to Errors in the admission and rejection of Evidence.*

If the evidence objected to and received operated in no way to the injury of the party making the objection, as where the evidence was given to prove an averment in the declaration, which, under the pleadings, the party offering the evidence was not bound to prove, no writ of error can be sustained thereon. Thus, in a suit on a writ of error bond, if the plaintiff, under the plea of non est factum, offers in evidence the record of recovery set forth in the declaration, the admission of such record is no ground of error; such proof, under the pleadings, is supererogatory.^a

An objection, that might have been taken to evidence on the trial before the jury, but which was not taken, will be considered as waived, and cannot be taken on error.^b

If evidence, tending to prove the issue, is ruled out, error lies.^c

An agreed statement of facts forms no part of the record, unless made so by the bill of exceptions.^d

6. *As to the Charge of the Court.*

It is error for the court to direct the jury to find particular facts which it is their province to decide, or to induce the jury to believe such facts by positive assertion that they are proved beyond question, as by saying "it is the plainest case I ever saw."^e But the court may state any hypothetical case in illustration, and comment on the facts in evidence.^f

One cannot assign for error, what the court did, at his own request.^g

If evidence is properly received, or an instruction or question of law properly decided, it is no ground of error that the court gave a wrong reason.^h

So, if the court give a wrong opinion upon an abstract question of law, not involved in the case, it is no ground of error.ⁱ

In examining a record, to ascertain whether a jury has been misled by the instructions of the court, the whole record will be looked into, in order to ascertain the effect of the instructions, and what must have been understood by the jury.^j

It is no objection to the charge of the court, that technical phrases are not employed, and the untechnical phrases will be construed as the court of error suppose the jury understood them; and if the jury were not misled by them, the language used forms no ground for error.^k

(a) 5 Ohio Rep. 169.

(p) 16 Ohio Rep. 5.

(q) Wright's Rep. 438, 744, 470.

(r) 16 Ohio Rep. 170.

(s) 2 Dana, 221; Wright, 334.

(a) Wright, 678. See ante p. 909, 910.

(t) 2 Litt. 145.

(u) 5 Ohio Rep. 136; 13 Ohio Rep. 21.

(v) 5 Ohio Rep. 375; 13 Ohio Rep. 21; 11 Ohio Rep. 489.

(w) 14 Ohio Rep. 592.

(x) 14 Ohio Rep. 592.

In what cases it lies.

The omission to instruct the jury upon a question of law, arising in the case, is not error, if no instruction was asked by the party.

When the instruction, refused by the court, appears from the record to be an abstract proposition, not arising, necessarily, in the case, no assignment of error can be sustained on account of such refusal.^a

Where the instruction of the court is incorrect, but upon a matter not material to the correct determination of the case, the judgment will not be reversed.^a

It is not error to instruct the jury to disregard testimony, instead of withdrawing it from them.^b

7. *As to the Verdict.*

A verdict rendered after the court order a nonsuit, is erroneous.^c

Where, in trespass against several defendants, who join in the general issue, but each set up for himself, in separate pleas, matters in justification, and the jury return a general verdict of guilty, without noticing the justification, it is error.^d For, in general, the verdict must be so entered as to pass upon all the issues, otherwise it will be erroneous.^d

But where the verdict in favor of the plaintiff substantially negatives the special pleas, the court will not reverse the judgment, based upon such verdict, though it does not, in terms, find that the allegations in the special pleas are untrue.^e

So, the omission to find an immaterial issue, is no error.^f

It is not error for a court to mould the verdict of a jury into form.^f

On error, the finding of the court will be treated precisely as the verdict of a jury.^g

It is a new feature in practice, and indeed in the administration of justice, that a court composed of judges who are all strangers to the trial, the conduct and appearance of the witnesses on the stand, should determine whether a verdict is against the weight of the testimony.

That few new trials can, with propriety, be granted on error, where there is any contradictory testimony submitted to the jury, is very evident; and the Supreme Court have, already, intimated such an opinion.^h

The court however will probably adhere, on error, to the general rules usually adopted by courts, in granting new trials; which have been heretofore stated.ⁱ

(y) 15 Ohio Rep. 123.

(z) 15 Ohio Rep. 156; 16 Ohio Rep. 321.

(a) 16 Ohio Rep. 513.

(b) Wright's Rep. 378.

(c) Wright, 334, 337, 376, 420.

(d) 5 Ohio Rep. 259; Wright's Rep. 282; 6 Ohio Rep. 521; 7 Ohio Rep. (Part 2) 234; 9 Ohio Rep. 131.

(e) 14 Ohio Rep. 187; 12 Ohio Rep. 112; 14 Ohio Rep. 187; 21 Wend. 90; 8 Cowen, 623; 21 Wend. 19.

(f) Wright's Rep. 645.

(g) 16 Ohio Rep. 170.

(h) 14 Ohio Rep. 282.

(i) See ante p. 922, et seq.

In what cases it lies.

Where the facts of a case are submitted to the Court of Common Pleas, instead of the jury, for decision, its judgment will not be reversed on error, though unsustained by the weight of the testimony;¹ but if, in such case, error intervenes in applying the law to the facts, error lies.²

8. *As to the Judgment.*

Where the judgment is too much, a remittitur may be entered in the court of error, and then the judgment affirmed.¹ But the defendant cannot assign for error that the judgment is too small.² Seventeen cents too much, is, it seems, not error.³

A judgment for costs against an infant lessor, for want of security for costs, is erroneous.⁴

It is error to take judgment for damages only, on a sheriff's bond—it should be for the debt, with the award of execution for damages.⁵

A joint judgment against husband and wife, for an assault committed by both, is erroneous.⁶ So, a judgment in trespass, *de bonis*, against several, one being a minor, is erroneous and bad as to all.⁷

Where the error is manifestly beneficial to the party, or where it is manifest that he is not prejudiced by the error, the judgment will not be reversed.

9. *As to Errors in other Proceedings in the Cause.*

Declaration against two, and all other proceedings afterwards, against one only;¹ or refusal to grant a new trial on affidavit of new evidence;² or dismissing a suit without a rule for security for costs, where no security for costs was indorsed on the original writ,³ is erroneous.

If, after the continuance, the parties appear and go to trial at the same term, there is no error, though the continuance be not, in form, set aside.⁴

Where it is assigned for error that the court below rendered a judgment by default, without any rule for a plea, the rules of court ought to be exhibited, that the court above may see if they have been violated.⁵

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| (j) 14 Ohio Rep. 586; see ante 903. | (q) Wright's Rep. 9. |
| (k) 15 Ohio Rep. 58. | (r) 14 Ohio Rep. 282. |
| (l) 3 Blackf. 133; 2 Pet. 327; 5 Ohio Rep. 259; Wright, 628. | (s) 12 Ohio Rep. 210, 112. |
| (m) 2 Ohio Rep. 343; 18 Ohio Rep. 131; Wright, 545, 547; 12 Ohio Rep. 210, 212 | (t) 4 Blackf. 155. |
| (n) 1 Dana, 357; see ante p. 925. | (u) 5 Blackf. 103. |
| (o) 6 Dana, 441. | (v) 2 Ohio Rep. 259. |
| (p) 2 Ohio Rep. 312. | (x) 2 Litt. 157. |
| | (y) 4 Ohio Rep. 135. |

By and against whom.

SEC. IV. BY AND AGAINST WHOM TO BE SUED OUT.

In general, a writ of error must be brought by the party against whom the judgment was rendered; but if one becomes privy to a judgment by operation of law, he should sue in his own name, and show his right by averment.^a

It may be brought by an administrator de bonis non, on a judgment against the former executor.^a

The assignee of a judgment may prosecute error in the name of the original party.^b

A purchaser at sheriff's sale, who is not a party to the suit, cannot sue in error.^c

It may be prosecuted in the name of the casual ejector.^d

If an action be brought against a feme covert as a feme sole, and she plead to issue as a feme sole, and judgment be given against her, she and her husband must join in bringing a writ of error. So, if an action be brought against a feme covert and others, they may all join with the husband, in bringing a writ of error.^e

As it is a general rule that no person can bring a writ of error, who was not a party or privy to the record, and prejudiced by the judgment, and therefore to receive advantage by the reversal of it, it has been determined that if there be judgment against the principal and also against the bail, the principal cannot have error on the judgment against the bail; nor the bail on the judgment against the principal, nor can they join in a writ of error; for these are distinct judgments, and affect different persons.^f

In general, where there is a joint judgment against two or more defendants, and their interest and liability is joint, they must jointly prosecute a writ of error.^g

But because, among those who become by operation of law, privies by interest in a judgment or the property affected by it, and therefore entitled to a writ of error, (as where the judgment debtors die,) there may be several and distinct interests, so, the remedy in such case for their respective rights, may be several and concurrent; as in the instances of the heir and devisee in respect to the land, and the executor in respect to the personal effects, taken or endangered by a judgment supposed to be erroneous. Where this happens, each privy to the judgment is distinctly entitled to a writ of error and to maintain it by himself; and this, notwithstanding a release by any other, having a like privy in the same judgment by a distinct interest.^h

(a) Wright's Rep. 737; 7 Ohio Rep. Part 2, 138.

(a) 8 Cowen 333, 346, per Spencer, C. J.

(b) Wright's Rep. 737.

(c) Wright's Rep. 574.

(d) 3 Ohio Rep. 26; 3 Bibb. 433; contra 1 Blackf. 214.

(e) Tidd's Prac. 1135.

(f) 2 Bac. Ab. 199; Cro. Car. 408; 1 Ld. Raym. 328; Arch. Pr. 210; Cro. Jac. 384.

(g) 11 Whea. 414; 8 Pet. 526; 3 Dana 434; 2 T. R. 738; 3 Burr. 1789.

(h) 10 Mass. 68; 11 Mass. 379.

Within what Time to be brought.

Where the judgment is against several parties, and one or more of them die, the writ of error may be brought by the survivors.¹

In such case it is usual to notice in the writ the decease of the party thus :

Because in the record and proceedings, and also in the rendition of the judgment, in a certain action of [assumpsit] which was lately in our said Court of Common Pleas before you, between A. B. [*the party for whom the judgment was given,*] and C. D. and E. F., [*those against whom the judgment was given,*] which said E. F. has since deceased, error hath intervened, as it is said, to the great damage of the said C. D., who hath survived the said E. F., deceased ; and we being willing, [&c.]

In trespass against three, if there be judgment by default against two of them, and the third plead to issue, and if it be found for him, the two only may bring a writ of error ; for the party in whose favor the judgment was given, cannot say that it was to his prejudice.²

The death of the defendant in error, after assignment of errors and joinder, does not abate the suit ; and the court will proceed on to judgment, without making the representatives parties.³

Where the error assigned, is, that the defendant in error was dead at the rendition of the judgment below, the executor or administrator must be made party defendant.⁴

SEC. V. WHEN AND WITHIN WHAT TIME THE WRIT MAY BE SUED OUT.

A writ of error from the Supreme Court to the Court of Common Pleas, must be brought within five years after the rendition of the judgment complained of. But if the person entitled to such writ, be an infant, feme covert, non compos mentis, or imprisoned, then the writ must be sued out within five years, exclusive of the time of such disability.⁵

Where one of the parties is within the saving clause of the statute of limitations, the case is saved as to all.⁶

A writ of error from the Court in Bank to the Supreme Court, must be brought within one year after the rendition of the judgment ; and the statute does not save the right of any party to sue, on account of disability.⁷

(i) Tidd's Pr. 1136 9th Lond. Ed.

(j) Tidd's Pr. 1136 ; 11 Mass. 379 ; 7 When. 530.

So, where one of the defendants made a separate defence, and he afterwards prosecuted a writ of error without joining the other two defendants in the writ ; and the other defendants also prosecuted a separate writ of error, it was held by the Supreme Court of the United States, that the defendants were not bound to sue out one writ of error. 6 Pet. 172. The case came from Louisiana By the English

rule, a writ of error suspends the execution ; and therefore, it is held, that all parties must, in general, join in the writ ; whereas, it seems, that, in the Circuit Court of the United States, execution goes against all those who have not joined in the writ of error and given bond. 6 Pet. 182.

(k) 3 Ohio Rep 307.

(l) 15 Ohio Rep. 300.

(m) Swan's Stat. 630.

(n) 3 Ohio Rep. 49 ; 12 Ohio Rep. 351.

(o) Swan's Stat. 690. sec. 153.

Præcipe for, and Writ of Error.

When a justice's judgment is reversed in the Common Pleas on certiorari, and the case retained for further proceedings, error does not lie, until the case is finally decided.²

And, generally, a writ of error cannot be prosecuted, until the record is complete by a final judgment.

SEC. VI. THE ISSUING SERVICE AND RETURN OF THE WRIT, (Supreme Court to the Court of Common Pleas.

1. *Præcipe for the Writ, &c.*

The writ issues as a matter of course, on præcipe filed with the clerk. The præcipe may be in the form following :

Form of Præcipe for Writ of Error, Notice and Citation.

A. B. }
v. } — Common Pleas.
C. D. }

Judgment in assumpsit [or case as the same may be,] at — term, A. D. 18—.

Issue a writ of error to the Court of Common Pleas, against — at the suit of — returnable on the — day of — next. Also issue notice and citation to defendant in error.

S. S., Att'y for pl'ff in error.

To the Clerk of Supreme Court of — county.

Date.

2. *Form of a Writ of Error to the Court of Common Pleas.*

The State of Ohio, — county, ss.

To the Honorable the Judges of the Court of Common Pleas within and for said county, Greeting :

[Seal.]

Because in the record and proceedings and also in the rendition of judgment in a certain action of *Debt*, which was lately in our said Court of Common Pleas before you, wherein A. B. was plaintiff, and C. D. was defendant, error has intervened, as it is said, to the damage of — and we being willing that such error, if any there be, should be corrected, and full and speedy justice done in that behalf, do command you that if final judgment be thereupon giv-

Service of the Writ—Its execution.

en, then without delay, you send to us distinctly and openly, under the seal of your court, and annexed to this writ, an authenticated copy of all judgments remaining of record in your court, in the action aforesaid, together with the original files and pleadings therein; so that having the same in our Supreme Court within and for the county of —, on the — day of — next, at the court house in said county, we may cause further to be done thereupon in our said Supreme Court, what of right and according to the laws of the land ought to be done.

Witness, A. C., Clerk of the Supreme Court within and for the said county of — this — day of —, A. D. —.

A. C., Clerk.

3. *The Service of the Writ, and how Executed by the Clerk of the Court of Common Pleas, and Form of Return thereon.*

The clerk of the Court of Common Pleas, upon receiving the writ, makes out a transcript of the final judgment, and all other journal entries in the cause; and this transcript, with the original files and pleadings, the assignment of errors and citation, is to be annexed to the writ, and returned therewith to the Supreme Court.^a

The transcript may be in the form following:

Form of the Transcript.

Transcript of the journals of the proceedings of the Court of Common Pleas of the county of —, between A. B. plaintiff, and C. D. defendant, in a plea of [assumpsit.]

March Term — to wit, March 10th, 1846.

A. B. }
v. } In Assumpsit.
C. D. }

On motion of the plaintiff this cause is continued at his costs.

June Term — to wit, June 25th, 1846.

A. B. }
v. } In Assumpsit.
C. D. }

This day came the parties, and the defendant on motion, has leave to amend his second plea, in thirty days, on payment of costs, and this cause is continued. [*Setting out, in like manner, all the entries verbatim.*]

^a (q) 43 vol. Stat. 80, 81, § 6.

Return to the Writ—How Supersedeas obtained.

Certificate thereto.

The State of Ohio, — county, ss.

I, A. C., clerk of the Court of Common Pleas of said county, do hereby certify, that the foregoing transcript contains all the orders, judgments and other journal entries of the said Court of Common Pleas, in the above case; and that the same are truly copied from the records of said court.

Witness, my hand and seal of office, this — day of —, A. D. —.

A. C., Clerk.

After making out the transcript, the clerk of the Court of Common Pleas will make the following indorsement upon the writ of error, as the return of the judges of the Court of Common Pleas to the writ:

Form of the Return.

The answer of the judges of the Court of Common Pleas within named.

An authenticated transcript of the judgments and all things concerning the same, together with the original files and pleadings, within mentioned, are annexed to this writ, and herewith returned, as within commanded:

Attest:

A. C., Clerk of — Common Pleas.

The original files and pleadings are not taken by the sheriff or parties from the custody of the clerk of the Court of Common Pleas. They are delivered by the clerk, with the writ of error, to the clerk of the Supreme Court.

SEC. VII. SUPERSEDEAS AND PROCEEDINGS TO OBTAIN THE SAME; WITH FORMS.

1. *In what case Supersedeas Bond required.*^a

Under the act of March, 1845, a writ of error bond is only required, when the plaintiff in error desires to prevent execution being issued; or, if issued, to prevent further proceedings upon it. A writ of error may issue without bond, but it only operates as a supersedeas, when bond is given.^b

The statute requires this bond to be executed by the applicant for the writ of error, to the adverse party, with one or more good and sufficient sureties, in double the amount of the judgment, conditioned for the payment of the condemnation money and costs, in case the judgment of the court below should be affirmed in whole or in part.^c

A bond, executed by sureties, is good, though not signed by the plaintiff in error.^d

(a) 43 vol. Stat. 80.

(b) 15 Ohio Rep. 9.

(c) 43 vol. Stat. 80, § 6; Swan's Stat. 680, §121.

(d) 10 Ohio Rep. 445.

Form of Supersedeas Bond and Writ.

It is necessary that the bond should be taken, before the citation and notice is issued.* If, after citation and notice, and after the case is actually in the Supreme Court on error, a bond is filed, the bond will not be good under the statute or at common law; and consequently, such bond will not operate as a supersedeas.^f

The bond and supersedeas may be in the form following :

2. *Form of Supersedeas Bond.*

Know all men by these presents, that we, C. D., E. F., [&c.], of, [&c.], are held and firmly bound unto A. B., of, [&c.], in the penal sum of — dollars, [*double the amount of the judgment,*] to the payment of which, well and truly to be made, we do by these presents jointly and severally bind ourselves. Sealed with our seals, and dated this — day of —, A. D. —.

The condition of the above obligation is such, that whereas the said C. D. has obtained an allowance of a writ of error [*or has sued out a writ of error*] upon a certain judgment rendered in the Court of Common Pleas within and for said county of —, at the — term thereof, A. D. —, in favor of A. B., and against C. D., for the sum of — dollars, damages, and also for — dollars, costs: Now, if the said C. D. shall pay the condemnation money and costs, in case the said judgment of the said Court of Common Pleas shall be affirmed by the Supreme Court, in whole or in part, then the above obligation shall be void; otherwise, in full force in law.

Taken by me, this — day of —, A. D. —.

R. B., Clerk Sup. Court, — County.

C. D., [SEAL.]

E. F. [SEAL.]

The State of Ohio, — County, ss.

[SEAL.]

To the Sheriff of said County, Greeting :

Whereas, by our certain writ of execution we lately commanded you, that of the goods and chattels, and for want thereof, then of the lands and tenements of C. D., in your bailiwick, you cause to be levied the sum of — dollars, damages, and — dollars, costs; which by the judgment of our Court of Common Pleas, of the said county of — at the — term thereof, A. D. —, A. B. had recovered against the said C. D. with interest thereon from — until paid; and also the further sum of — dollars, costs of increase, and accruing costs; and that you have that money before the said Court of Common Pleas on the first day of the — term thereof, A. D. —, to render unto the said A. B.; But because the said C. D., before the return of our said writ of execution, has sued out of our Supreme Court within and for the said

(e) Swan's Stat. 679, § 120.

(f) 15 Ohio Rep. 606.

 Notice and Citation.

county of —, our certain writ of error upon the judgment aforesaid, and has given bond and security thereupon, in due form of law, as we are informed by the said C. D., therefore we command you, that you forbear all further proceedings upon our said writ of execution against the said C. D., or in any way molesting the said C. D. on occasion of that judgment; and have you then there this writ.

Witness, A. C., Clerk of our said Supreme Court, at —, this — day of —, A. D. —.

A. C., Clerk.

 SEC. VIII. NOTICE AND CITATION AND SERVICE THEREOF.

Whenever a writ of error is issued, the clerk of the Supreme Court issues a Citation, signed by him, which must be served on the adverse party, or his attorney, at least ten days before the commencement of the term, to which the writ of error is returnable.^a Service upon the attorney, after the death of the party, is invalid.^b

The citation and notice may be in the form following :

Form of Notice and Citation.

The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting :

We command you that you give notice to A. B., of, [&c.] that C. D., of, [&c.] has sued out from our Supreme Court a writ of error upon a certain judgment of the Court of Common Pleas of the said county of —, of the — term thereof, A. D. —, for — dollars, damages, and — dollars costs, in a certain plea of *assumpsit* then pending in said court, wherein the said A. B. was plaintiff, and the said C. D. was defendant ; and also that you make known to the said A. B. that he be before the Judges of our Supreme Court within and for the said county of —, at the Court House in said county, on the first day of their next term, to show cause, if any there be, why the said judgment should not be reversed, annulled, and altogether held for nothing, and why speedy justice should not be thereupon done between the parties in that behalf.

Witness, A. C., Clerk of the said Supreme Court, at — this — day of —, A. D. —.

A. C., Clerk.

A copy of the notice and citation is served by the sheriff, upon the defendant in error, or his attorney, in the same manner as other mesne process ; and the original is annexed to the writ of error, with the transcript and assignment of errors, and the whole is thus delivered to the clerk of the Supreme Court.

(g) 43 vol. Stat. 81. § 6.

(h) 15 Ohio Rep. 300.

Assignment of Errors.

The sheriff makes out a copy of the notice and citation, and serves it on the defendant in error, or his attorney. The service and the return is made as directed in the case of a summons.¹

SEC. IX. THE ASSIGNMENT OF ERRORS.

The assignment of errors was formerly, in general, made at the foot of the record, but as no record is now made out, it may be made out upon a separate paper, and the clerk will annex it to his transcript of the proceedings.

Error in fact and error in law cannot be assigned together; they require different proceedings: as distinct as the proceedings upon a demurrer and an issue at law; for, errors in fact may be tried by a jury, but errors in law by the court.

It seems, however, if errors in fact and errors in law are assigned to the same record, and the defendant in error pleads in nullo est erratum, it is a confession of the error in fact, and the judgment must be reversed.¹

Where error in fact and error in law are both assigned, the defendant in error should demur for duplicity.¹

Where error in fact is assigned, the plaintiff should conclude with an averment: "And this the said C. D. is ready to verify," &c., in order to give an opportunity of trying the fact by the country, if the defendant in error desires to take issue on the fact.²

A party may assign as many errors in law as he pleases; but, it seems, he can assign but one error in fact.¹

If there be errors in the record, but the errors assigned are not errors, the court will reverse the judgment, because no error should be left in the record. And so, if matter of fact is pleaded in bar of the writ of error, and on issue joined it is found for the defendant in error, yet the court may examine the judgment, and if error is found in it, may reverse it.² So, if there be any matter in the record to affirm the judgment, which is not pleaded, the court may take advantage of it, to sustain the judgment.² And where error in fact is assigned, the court will examine the whole record, and if there be error in law, apparent on the face of the record, will reverse the judgment;² so that the plaintiff in error will thus have the same advantage, indirectly, as if error in fact and in law were both assigned, and which, we have seen, cannot be directly done.²

(i) As to service of a summons, see ante, p. 145; as to the return, see ante, p. 146.

(j) 9 Johns. Rep. 159; Salk. 268; Ld. Raym. 833, 1105; 15 Johns. Rep. 87, 159.

(k) 24 Eng. C. L. Rep. 30; 1 Burr. 410.

(l) Dane Ab. 73; F. N. B. 20.

(m) Story's Pl. by Ol. 371; Vin. Ab. Error, (E. C.) 12.

(n) 24 Eng. C. L. Rep. 30.

Assignment of Errors — Pleadings.

Form of Assignment of Errors.

C. D., [*Plaintiff in Error.*] }
v.
A. B., [*Defendant in Error.*] }

And the said C. D. now comes and says, that in the accord and proceedings aforesaid, there is manifest error in this, to wit:

1st. The court erred in charging the jury, that, [&c.]

2d. The said verdict is manifestly against the evidence in the case.

3d. The said judgment was given in favor of the said A. B., whereas by the laws of the land it ought to have been given in favor of the said C. D.; wherefore the said — prays that a citation and supersedeas may issue, and that the said judgment may be reversed, annulled, and held for nothing, and that he may be restored to all things he has lost by reason thereof.

By J. S., his Attorney.

SEC. X. PLEADINGS IN ERROR.

Special pleas are, in general, release of error, the statute of limitations, &c.

A plea of the release of error by an infant, after judgment, and after he comes of age, is bad.

The common plea to the assignment of errors, is, in nullo est erratum, which refers the whole matter in law, to the judgment of the court.* The form is as follows:

1. *Form of Common Joinder.*

A. B. }
v. } In Error.
C. D. }

And the said A. B. now comes and says, that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and therefore he prays, that the said judgment may be affirmed, and that his costs may be adjudged to him, &c.

By J. S., his Attorney.

2. *Form of Plea of Release of Errors.*

A. B. }
ats. } In Error.
C. D. }

And the said A. B., by E. F. his attorney, comes and says that the said C.

Brief—Argument—Judgment.

D. ought not further to prosecute or maintain his writ of error aforesaid against him, the said A. B., because he says, that after the judgment aforesaid, in form aforesaid recovered, and before the day of suing out the said writ of error, to wit, on, [&c.,] at, [&c.,] he, the said C. D., by the name of, [&c.,] by his certain writing of release, sealed with the seal of him, the said C. D., and to the court now here shown, the date whereof is the same day and year aforesaid, did remise, release and forever quit claim to the said A. B. by the name of, [&c.,] his heirs, executors and administrators, all and all manner of error and errors, writ and writs of error, and all benefits and advantages of the same, and all misprisions of error and errors, defects and imperfections whatsoever, had, made, committed, omitted, done or suffered in, about, touching or concerning the judgment aforesaid, obtained against him, the said C. D., by the said A. B., in the said term of —, then last had in the said court of —, for — dollars damages, besides costs of suit, or in, about, touching or concerning any warrant, process, declaration, plea, entry, or other proceeding whatsoever, of or in any manner concerning the same judgment, as by the said writing of release more fully appears. And this he, the said A. B., is ready to verify; whereupon he prays judgment if the said C. D. ought further to prosecute or maintain his writ of error aforesaid against him, the said A. B., &c.

 SEC. XI. BRIEF AND ARGUMENT.

The plaintiff in error, in all cases upon writ of error, or the defendant, if the pleadings are so made up that he holds the affirmative of the issue, must prepare and present to the court on the first day of the term, a brief, containing the points and authorities relied on.^q

Upon common joinder in error, the plaintiff in error holds the affirmative, and opens and closes the argument.

 SEC. XII. JUDGMENT IN ERROR.
1. *As to the Amount, and Form.*

The statute provides that, upon the affirmance of a judgment by the Supreme Court on writ of error, brought by the defendant below, the court shall render judgment against the plaintiff in error, for five per centum, damages, upon the amount due from the plaintiff in error to the defendant in error, unless the court shall be satisfied, and so enter upon their minutes, that there was reasonable ground for the prosecution of the writ of error. If, therefore,

(q) Rule of Court, ante, p. 7.

(r) 44 vol. Stat. 34.

Judgments of Affirmance.

the Supreme Court affirm a judgment, without giving also the penalty, and omit to certify that there was reasonable ground for the prosecution of the writ of error, the judgment may be reversed by writ of error, from the Court in Bank.

When a judgment is reversed in the Supreme Court, in whole or in part, the court may proceed, either to render such judgment as the Court of Common Pleas should have rendered, or remand the cause to the Court of Common Pleas, by a writ of procedendo, for such judgment. Where a judgment is reversed in whole or in part, the Supreme Court cannot award execution; but a special mandate is sent down to the Common Pleas, to award execution.*

2. *As to Costs.* See ante, p. 994.

3. *Form of Judgment of Affirmance on Default, with Penalty.*

A. B. }
v. } In Error.
C. D. }

This day came the said C. D., by Mr. O. his attorney, and the said A. B., though solemnly called, came not, nor doth he further prosecute his writ, but makes default: Therefore it is considered, that the said A. B. take nothing by his writ aforesaid, and that the judgment aforesaid, in form aforesaid given, be in all things affirmed, and stand in full force and effect. And it is further considered, that the said C. D. do recover against the said A. B., as well his costs in this behalf expended, taxed to — dollars, as also — dollars, five per centum penalty on the amount due to him on the judgment aforesaid, now adjudged to him by the court here, according to the form of the statute in such case made and provided, which said costs and penalty, in the whole, amount to — dollars; and it is ordered, that a special mandate be sent down to the said Court of Common Pleas, to carry this judgment into execution.

4. *Form of Judgment of Affirmance, on Hearing.*

A. B. }
v. } In Error.
C. D. }

This day came the parties by their attorneys, and thereupon this cause came on to be heard, as well upon the transcript of the judgments and other proceed-

 Judgments of Affirmance—Reversal.

ings between the said parties in the Court of Common Pleas of — county, and the original files and pleadings, brought here by writ of error from this court to said Court of Common Pleas, as also upon the matters by the said A. B. herein assigned for error; and the same being seen and by the court now here fully understood, and mature deliberation being thereupon had, it appears to the Court here, that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid: Therefore it is considered, that the judgment aforesaid, in form aforesaid given, be in all things affirmed, and stand in full force and effect.* And it is further considered, that the said C. D. do recover against the said A. B., as well his costs in this behalf expended, taxed to — dollars, as also — dollars, five per centum penalty on the amount due to him on the judgment aforesaid, now adjudged to him by the court here, according to the form of the statute in such case made and provided, which said costs and penalty, in the whole, amount to — dollars; and it is ordered that a special mandate be sent down to the said Court of Common Pleas, to carry this judgment into execution.

5. *Form of Judgment of Affirmance on Hearing, without Penalty.*

*Proceed as above to the *, and then as follows:]* And it is further considered, that the said C. D. do recover against the said A. B. his costs, in this behalf expended, taxed to — dollars. And it is ordered, that a special mandate be sent down to the Court of Common Pleas, to carry this judgment into execution. The court here are satisfied, that there was reasonable ground for the prosecution of this writ of error.

6. *Form of Judgment of Reversal.*

A. B. }
 v. } In Error.
 C. D. }

This day came the parties by their attorneys, and thereupon this cause came on to be heard, as well upon the transcript of the judgments and other proceedings between the said parties in the Court of Common Pleas of — county, and the original files and pleadings, brought here by writ of error from this court to the said Court of Common Pleas, as also upon the matters by the said A. B. herein assigned for error; and the same being seen and by the court now here fully understood, and mature deliberation being thereupon had, it appears to the Court here, that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, to wit, That, &c., and also in this, to wit, That, &c., [*specifying the several grounds of error:*] Therefore it is considered, that the judgment aforesaid, for the errors afore-

Judgments of Reversal.

said, be reversed, annulled, and altogether held for nothing; and that the said C. D. be restored to all things which he has lost by occasion of the said judgment, and recover against the said A. B. his costs in this behalf expended, taxed to — dollars.* And it is ordered, that a special mandate be sent down to the said Court of Common Pleas, to carry this judgment into execution.

7. *Form of Judgment of Reversal, and Judgment for Plaintiff in the Supreme Court.*

*Enter the judgment of reversal as in the last Precedent to the *, and then say:]* And thereupon the court here, according to the statute in such case made and provided, proceeding to render such judgment upon the premises as ought to have been rendered by the said Court of Common Pleas, it is considered, that the said A. B. do recover against the said C. D. the said sum of — dollars, his *debt* aforesaid, and — dollars for his damages, by reason of the detention thereof, and also his costs in that behalf expended, taxed to — dollars. And it is ordered, that a special mandate be sent down to the said Court of Common Pleas, to carry this judgment into execution.

8. *Form of Judgment of Reversal and cause Remanded, by Procedendo, for Final Judgment.*

Enter the judgment of reversal as in No. 3, ante 1152, and then say:]— And thereupon it is ordered, that a special mandate be sent down to the said Court of Common Pleas, to carry this judgment into execution. And it is further ordered, that this cause be remanded to the said Court of Common Pleas, by writ of procedendo, commanding the judges of the said court to proceed, according to the form of the statute in such case made and provided, with what speed they can, to overrule the said demurrer of the said C. D. to the said declaration of the said A. B., and thereupon to render final judgment in favor of the said A. B. against the said C. D., for the said sum of — dollars, his *debt* aforesaid, and — dollars for his damages, by reason of the detention thereof, and also for his costs in that behalf expended, taxed to — dollars, [*or, to proceed in said cause with what speed they can, in such manner, according to the laws of the land, as they shall see proper, the said writ of error to the contrary notwithstanding, as the case may be.*]

9. *Form of Judgment of Reversal, in part, and Affirmance, in part.*

A. B.	}	In Error.
v.		
C. D.		

This day came the parties by their attorneys, and this cause came on to be heard, as well upon the transcript of the judgments and other proceedings between the said parties in the Court of Common Pleas of — county, and the original files and pleadings, brought here by writ of error from this court to the said Court of Common Pleas, as also upon the matters by the said A. B. herein assigned for error; and the same being seen and by the court now here fully understood, and mature deliberation being thereupon had, it appears to the court here, that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, to wit, That, [*&c., specifying the errors,*] and that there is no other error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid: Therefore it is considered, that the judgment aforesaid, in form aforesaid given, so far as it respects the sum of, [*&c.,*] and also so far as it respects, [*&c., specifying the parts reversed,*] for the errors aforesaid, be reversed, annulled, and altogether held for nothing; and that the said C. D. be restored to all things which he has lost by occasion of the said judgment in those respects. And it is further considered, that the judgment aforesaid, in form aforesaid given, be in all other things affirmed, and stand in full force and effect; and that the said A. B. recover against the said C. D. one moiety, and the said C. D. against the said A. B. the other moiety, of the costs by them respectively in this behalf expended, taxed to — dollars. And it is ordered, that a special mandate be sent down to the Court of Common Pleas, to carry this judgment into execution.

SEC. XIII. PROCEEDINGS ON JUDGMENT IN ERROR.

1. *Mandate from the Supreme Court to the Court of Common Pleas.*

The statute provides¹ that when a judgment shall be reversed in the Supreme Court, in whole or in part, such court may proceed, either to render such judgment as the Court of Common Pleas should have rendered, or remand the cause to the Court of Common Pleas, by writ of procedendo, for such judgment; and the Supreme Court shall not issue execution in causes that are removed before them by writ of error, on which they pronounce judgment as aforesaid, or on appeals, but shall send a special mandate to the Court of Common Pleas to award execution thereupon; and the Court of Common Pleas is required to proceed in such cases, in the same manner, as if such judgment had been rendered therein.

(1) Swan's Stat., 680, § 131.

Mandate to the Court of Common Pleas.

An execution from the Common Pleas, on a judgment in the supreme Court, without a mandate, would, it seems, be invalid.³

As a writ of error and supersedeas do not operate retrospectively, upon the acts of the officer under an execution previously issued or levied; and the officer returns, on the execution, what he has done under it, before the writ of error was allowed, or before the supersedeas issued; so, after the writ of error is at an end, the judgment creditor is entitled to the benefit of the return.⁴

Where judgment is entered in the Supreme Court, upon error or certiorari, there is generally added at the end of the judgment the following order as in the preceding forms:

And it is ordered that a special mandate be sent down to the said Court of Common Pleas to carry this judgment into execution.

An order of the Supreme Court, "That all causes removed into the court from the Common Pleas, in which the court have, during the term, entered judgment or pronounced decrees, be certified to the Court of Common Pleas, with a special mandate to carry the same into execution," is, it seems, valid; and the clerk, in making up the complete record, may, in each case, attach an order for a special mandate, to carry the judgment or decree into execution.

The order "to carry the judgment into effect" and "to award execution" in a mandate, mean the same thing.

The mandate is generally issued, of course, without *præcipe*.

There seems to be no limited time for presenting a mandate to the court below.* A year's delay does not work a discontinuance of the cause.*

On presentation of a mandate, and motion to proceed in pursuance of its command, the court below have no discretion, and must obey it; and if disobeyed, the Supreme Court will enforce it by *procedendo* or *mandamus*.

2. Form of Mandate on Judgment of Affirmance.

The State of Ohio, — county, ss.

To the Honorable, the Judges of the Court of Common Pleas within and for said county, Greeting:

Whereas, in a certain action of *Assumpsit* lately before you, wherein A. B. was plaintiff and C. D. was defendant, the said C. D., on the — day of — A. D. —, by your consideration in that behalf, recovered against the said A. B. the sum of — dollars, damages, and — dollars, costs of suit; And whereas, afterwards, by our certain writ of error, we caused a transcript of the judgments and other proceedings before you, between the parties aforesaid, with the original files and pleadings in the action aforesaid, to be brought into our Supreme Court, within and for the said county of —, whereupon such proceedings were had in our said Supreme Court, that at the — term there-

(u) 6 Ohio Rep. 409.

(v) Wright's Rep. 588.

(d) 4 Ohio Rep. 458, 464, 467.

Mandate to the Court of Common Pleas — Order thereon.

of, A. D. —* it was considered that the judgment aforesaid, by you in form aforesaid given, be in all things affirmed, and stand in full force and effect; and that the said C. D. recover against the said A. B. as well — dollars, his costs by him in that behalf expended, as also — dollars, five per centum penalty on the amount due to the said C. D. on the judgment aforesaid, then and there adjudged to him by our said Supreme Court, according to the form of the statute in such case made and provided, which said costs and penalty amount in the whole to — dollars; and that a special mandate be sent to you to carry the said judgment of our said Supreme Court into execution: Therefore we command you, that without delay you cause the said C. D. to have execution against the said A. B. for the moneys aforesaid, pursuant to the statute in such case made and provided; the said writ of error to the contrary notwithstanding.

Witness, A. C., Clerk of our said Supreme Court, at C., this — day of — A. D. —.

[Seal.]

A. C., Clerk.

3. *Form of Mandate on Judgment of Reversal.*

Proceed as in the last form to the () and then say,* It was considered that the judgment aforesaid, by you in form aforesaid given, be reversed, annulled, and altogether held for nothing; and that the said C. D. be restored to all things which he had lost by occasion of the said judgment, and also recover against the said A. B. — dollars, for his costs by him in that behalf expended; and that a special mandate be sent to you to carry the said judgment of our said Supreme Court into execution: Therefore we command you, that without delay you cause the said C. D. to be restored to all things which he has lost by occasion of the said judgment, and that he have his execution against the said A. B. for the said sum of — dollars for his costs aforesaid; the said writ of error to the contrary notwithstanding.

Witness, &c.

4. *Order of the Court of Common Pleas, on Mandate from the Supreme Court, with Forms.*

It is necessary that the mandate should be served upon the Court of Common Pleas; but this service is acknowledged, and, indeed, made, by an entry on the journal of the Court, and an order for an execution in pursuance of the mandate.

The entry and order are usually made, by the clerk of the Court of Common Pleas entering all the cases from the Supreme Court, in which a mandate has been issued, upon the journal of the Court of Common Pleas, at the term

Order of the Court of Common Pleas on Mandate.

next after the session of the Supreme Court, stating succinctly the date and amount of the original judgment, the original costs, the costs on error and the penalty, and at the end a general order that execution issue on all the mandates. The form is in general as follows :

Form of General Order of the Court of Common Pleas on Mandates.

This day was filed with the clerk of this court mandates from the Supreme Court of this county, commanding executions, &c., to be issued &c., in the following cases, namely :

A. B.	}	Judgment, <i>May</i> Term, 1859, of Common Pleas		
v.			Affirmed,	● ———
C. D.			Costs in Common Pleas,	● ———
			Penalty in Supreme Court,	● ———
		Costs of A. B. in Supreme Court,	● ———	
		Costs of C. D.		

E. F.	}	Judgment <i>May</i> Term, 1859, of Com. Pleas reversed.
v.		
G. H.		

Judgment for E. F. in the Supreme Court, Dec. Term, 1859,	● ———
Costs of G. H.	● ———

It is ordered that executions issue upon the respective judgments aforesaid, in pursuance of the said mandates respectively, upon præcipe filed.

When the order is made in each case it may be in the form following :

A. B.	}	On Mandate from the Supreme Court.
v.		
C. D.		

This day came the said A. B., by Mr. O., his attorney, and filed with the clerk of this court a Special Mandate from the Supreme Court of this county, dated, [&c.] commanding the judges of this court that they cause execution to be issued upon a certain judgment of this court of the term of —, in favor of the said A. B. against the said C. D. for — dollars, damages, and — dollars costs ; and also for — dollars costs, adjudged by the said Supreme Court to the said A. B. upon a certain writ of error prosecuted in that Court by the said C. D. upon the judgment aforesaid ; and also for the further sum of — dollars, five per centum penalty on the judgment aforesaid, also adjudged by the said Supreme Court to the said A. B. upon the writ of error aforesaid, which said costs in error and penalty amount in the whole to — dollars ; and thereupon, on motion of the said A. B., It is ordered, that the said

Writ of *Procedendo*.

A. B. have his execution for the moneys aforesaid, pursuant to the said *Mandate*.

5. *Writ of Procedendo and Form thereof.*

This is a judicial writ, directed to the judges of the inferior court, commanding them to proceed in the cause, notwithstanding the writ before delivered to them, and it removes the suspension created by a *certiorari* or writ of error.

Its form, in general, is as follows :

Form of Writ of Procedendo.

The State of Ohio, — County, ss.

To the Honorable the Judges of the Court of Common Pleas within and for the said County, Greeting :

Although lately we commanded you, by our certain writ of error, that you send to us, in our Supreme Court within and for the said county of —, an authenticated copy of all judgments remaining of record, in your said Court of Common Pleas, in a certain action of *debt*, wherein A. B. was plaintiff, and C. D. was defendant, with the original files and pleadings therein, so that having the same in our said Supreme Court on the — day of — A. D. —, at the Court House in said county, we might cause further to be done thereupon, what of right and according to the laws of the land ought to be done; yet we, being now moved for certain causes, in our said Supreme Court, do command you, that in the action aforesaid you proceed, with what speed you can,* in such manner, according to the laws of the land, as you shall see proper; the said writ of error to the contrary notwithstanding.

Witness, A. C., Clerk of our said Supreme Court, at C., this — day of —, A. D. —.

A. C., Clerk.

Form of Writ of Procedendo with Special Instructions.

*Proceed as in the last precedent to the *, and then say :*] — To overrule the said demurrer of the said C. D. to the said declaration of the said A. B., and thereupon to render final judgment in favor of the said A. B. against the said C. D., for the said sum of — dollars, his *debt* aforesaid, and — dollars for his damages by reason of the detention thereof, and also for his costs in that behalf expended, taxed to — dollars; the said writ of error to the contrary notwithstanding.

Witness, &c.

The writ being produced to the Court of Common Pleas, the cause is re-

 Restitution; and form of the Writ.

entered upon the docket under the same title as before the judgment; and thereupon further proceedings are had, pursuant to the command of the writ.^a

6. *Writ of Restitution and the Form thereof.*

If the judgment below be reversed, and has been paid or executed, the plaintiff in error shall have his writ of restitution, in order that he may be restored to all that he has lost by the judgment.^b

The reversal of the judgment, however, does not affect the title of purchasers under the reversed judgment; but restitution is made by the judgment creditor of the moneys for which the property sold, with interest from the day of sale.^d

A purchaser under the judgment, at least if that purchaser be not the judgment debtor himself, cannot be divested of his title by a reversal of the judgment, even if the reversal take place before the confirmation of the sale.^c

If execution on the former judgment has been actually executed, and the money paid over, the writ of restitution may issue without any previous scire facias. So, if the judgment of reversal specify the precise amount to be restored, a scire facias is not necessary. But if only a part of the amount of the judgment be paid, or the precise amount or thing to be restored, be not specified by the judgment of reversal, but depends upon evidence, dehors the record, then a scire facias quare restitutionem non, must previously issue.^e

The writ of restitution may be in the form following:

The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting:

Whereas A. B. lately, that is to say, at the — term of our Court of Common Pleas, within and for the said county of —, A. D. —, by our writ, and by the judgment of the same court, recovered against C. D. — dollars, for his damages, and — dollars for his costs, whereof the said C. D. is convicted, as by the record and proceedings thereof, which for certain causes of error we lately caused to be brought into our Supreme Court within and for the said county of —, appears to us of record: And by reason of divers errors in the said record and proceedings, and also in giving the judgment aforesaid, we have reversed and totally annulled the same; and we have further considered in our said Supreme Court, that the said C. D. be restored to all things which he hath lost on occasion of the judgment aforesaid: And

(a) Wright 588.

(b) Cro. Jac. 696; 4 Mod. 161.

(c) 2 Saund. 101, y. 69; 4 Ohio Rep. 374.—
See ante, p. 1120, as to the scire facias.

(d) Swan's Stat. 479. The judgment creditor is entitled to interest on his judgment to the

time of the confirmation of the sale, and should consequently answer for interest either from that time or from the day of the sale. As to a sale under a mortgage where the mortgagee becomes the purchaser, see 8 Ohio Rep. 120.

(e) Wright's Rep. 520.

From the Court in Bank to the Supreme Court.

whereas, for having execution of the judgment of restitution aforesaid, our Special Mandate was sent down from our Supreme Court aforesaid to our said Court of Common Pleas, according to the form of the statute in such case made and provided: And whereas, the said A. B. on pretence of the said former judgment, hath had his execution of the damages aforesaid, and is yet possessed thereof, as we are informed; Therefore, we command you, that if it can be made appear to you, that the said A. B. hath had his execution of the damages aforesaid, by virtue of the judgment aforesaid, then without delay you cause the said C. D. to have full restitution of the said sum of — dollars, the damages aforesaid, and — dollars, the costs aforesaid, with legal interest thereon from — [*date of the sale or payment* ;] and if you cannot cause him to have restitution thereof, then that you cause the same to be levied of the goods and chattels, and for want thereof, of the lands and tenements of the said A. B. in your bailiwick, and that you cause that money to be delivered without delay to the said C. D. ; And in what manner you shall execute this writ, make appear to our said Court of Common Pleas on the first day of their next term.

Witness, A. C., Clerk of our said Court of Common Pleas, at C., this — day of —, A. D. —.

A. C., Clerk.

SEC. XIV. PROCEEDINGS ON A WRIT OF ERROR FROM THE COURT IN BANK TO THE SUPREME COURT.

Exceptions may be taken to an order or judgment of the Supreme Court on the circuit, and made a part of the record.^d So, the record generally, of final judgments of the Supreme Court, may be reviewed by writ of error from the Court in Bank.^e

We have already seen that this writ must be prosecuted within one year after the rendition of the judgment.^f

It is not issued as a matter of course ; but only on allowance of the court when in Bank, or by two judges in vacation.^g

Upon the allowance no writ is in practice sued out. If allowed in Bank, the official signature of the judges to the allocatur, or a copy of the journal entry furnished to the clerk of the county, is the proper way of officially informing him of the allowance of the writ ; or if allowed in vacation, the official signature of two judges to the allocatur furnished to the clerk, will be sufficient.^h

The clerk of the Supreme Court, upon being thus advised of the allowance of the writ, makes out an authenticated transcript of the record, upon which errors are to be assigned, and the same is then forthwith transmitted to the clerk of the Court in Bank.ⁱ

(d) Swan's Stat. 691, sec. 156.

(e) Id. 690, sec. 153.

(f) Swan's Stat. 690, sec. 153.

(g) 14 Ohio Rep. 468.

(h) Swan's Stat. 690, sec. 154.

A citation is also made out by the clerk of the Supreme Court of the county ; which must be served upon the opposite party or his attorney, at least twenty days before the setting of the Court in Bank ; but if neither the defendant in error nor his attorney reside in the state, the plaintiff in error must give notice of the allowance of the writ for three successive weeks previous to the sitting of the Court in Bank, by publication in some newspaper, published in the county in which the original record remains ; and if no newspaper is published in the county, then in some newspaper of most general circulation therein.¹

The writ will not operate as a supersedeus unless the clerk of the Supreme Court, before issuing the citation and notice, takes a bond from the applicant to the adverse party, with one or more good and sufficient securities in double the amount of the judgment obtained, conditioned for the payment of the condemnation money and costs in case the judgment of the Supreme Court should be affirmed in whole or in part.

The forms of the citation, notice, bond and other proceedings, are substantially the same as on writs of error issued by the Supreme Court to the Court of Common Pleas, and contained in the preceding sections of this chapter.

When the judgment of the Supreme Court is reversed in whole or in part, or affirmed, the Court in Bank render judgment or remand the cause for execution, &c., in like manner as the Supreme Court proceed on error from the Common Pleas.¹

Form of Order of Allowance by the Court in Bank.

A. B. }
v. } In [Assumpsit.] From — County.
C. D. }

On motion of the said C. D. a writ of error is allowed in this cause.

The like by two Judges in Vacation [Indorsed on Transcript.]

On Application of A. B. we allow a writ of error in this cause, this — day of — A. D. —.

J. S.,

N. S.,

Judges of the Supreme Court.

SEC. XV. ERROR CORAM NOBIS IN COMMON PLEAS.

1. *In what Cases and how Allowed.*

We have already seen that final judgments of the Court of Common Pleas may be examined and reversed for alleged errors in fact, upon a writ of error coram nobis.

(i) Swan's Stat. 690, sec. 154.

(j) Id. Ib. sec. 157; see ante p. 1157; as to costs see ante, p. 994

The writ is allowed on cause shown, and not of course by the president judge of the circuit.^k

An authenticated transcript of the record, with the assignment of errors thereon, is presented to the president judge for his allowance of the writ.

An affidavit, showing the truth of the fact assigned as error, should, it seems, accompany the transcript; and a notice to the opposite party, or his counsel, of the application for the writ, seems also necessary.^l A copy of the notice with affidavit annexed, showing its service, should be annexed to the transcript.

2. *Form of Assignment.*

And afterwards, to wit, on this tenth day of June, in the year of our Lord one thousand eight hundred and forty six, came Henry Styles and Ann Styles, late Ann Smith, now wife of the said Henry Styles, who claim part and parcel of the lands and tenements aforesaid, under the last will and testament of the said Robert Smith, devising the same in fee simple to the said Ann, which said last will and testament of the said Robert Smith is duly proven and recorded in the said county of —, and is now brought here into court; and say, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said A. B. jointly against the said Robert Smith, and John Nokes, and Thomas Nokes, in the plea aforesaid; when in truth and in fact, the said Robert Smith in the plea aforesaid named between the parties aforesaid, and before the giving of the judgment aforesaid, to wit, on the sixteenth day of November, in the year of our Lord one thousand eight hundred and forty-five, at the county of —, aforesaid, died; and therefore in that there is manifest error; and this they, the said Henry Styles and Ann his wife, are ready to verify; wherefore they pray that the judgment aforesaid may be revoked, annulled, and altogether held for nothing, and that restitution and restoration be made of all things lost by occasion of the said judgment; and that a citation may be issued to give notice to the said A. B. that he be before the honorable the Judges aforesaid, on — next, to hear the record and proceedings aforesaid, and the matter above assigned to error, &c.

By T. S., their Attorney.

(k) 43 vol. Stat. 89. sec. 5.

(l) 20 Wend. 626; 19 Id. 620; 1 McLean, 143; 7 Pet. 144.

Coram Nobis, in Common Pleas.

3. *Form of Notice.*

A. B. }
 v. }
 C. D. } In Case. — Common Pleas.

This is to give you notice that on — next, at ten o'clock in the morning, or as soon thereafter as counsel can be heard, at the dwelling house of J. S., President Judge of the — judicial circuit of the Court of Common Pleas of the State of Ohio, I shall apply to the said J. S. for a writ of error coram nobis in the above case.

C. D.

To Mr. A. B.

Dated, [&c.]

4. *Form of Affidavit.*

A. B. }
 v. }
 C. D., et al. } In Case. — Common Pleas.

J. R. of, [&c.,] makes oath and says, that he knew Robert Smith, one of the defendants in the above cause, who usually resided at —, in the county of —, and that the said Robert Smith died on — last, or thereabouts, at the county of — aforesaid.

Sworn to, [&c.]

5. *Form of Allowance.*

On application of A. B., I allow a writ of error coram nobis in this cause, this — day of —, A. D. —, returnable at the next term of the Court of Common Pleas of — county.

J. S., Pres't Judge of the — Circuit.

6. *Form of Writ.*

The State of Ohio, — county, ss.

To the Honorable the Judges of the Court of Common Pleas within and for the said county of [Franklin,] Greeting:

[SEAL.]

Because in the record and proceedings, and also in the giving of judgment, in a certain plea of [assumpsit,] which was lately before us in our said Court

Coram Nobis, in Common Pleas.

of Common Pleas of the said county of [Franklin,] between A. B., plaintiff, and C. D., defendant, which said record and proceedings now remain before us in our said Court of Common Pleas, as it is said, manifest error hath intervened, to the great damage of the said C. D., as by his complaint we are informed. We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then that the record and proceedings aforesaid being inspected, you cause further to be done thereupon, for correcting that error, what of right and according to the laws of the land ought to be done.

Witness, A. C., clerk of our said Court of Common Pleas of [Franklin] county, at Columbus, this — day of —, A. D. —.

A. C., Clerk.

7. *Form of Citation.*

The State of Ohio, — county, ss.

[SEAL.] To the Sheriff of said county — Greeting :

We command you that you make known to A. B., of, [&c.,] that he be before the Judges of our Court of Common Pleas within and for the county of [Franklin] aforesaid, at the court house in said county, on the first day of their next term, to show cause, if any there be, why a certain judgment of the said Court of Common Pleas, of the — term thereof, A. D. —, for — dollars damages, and — dollars costs, in a certain plea of [assumpsit] then pending in said court, wherein the said A. B. was plaintiff, and the said C. D. was defendant, should not be revoked, annulled, and altogether held for nothing ; and why speedy justice should not be thereupon done between the parties in that behalf.

Witness, L. H., clerk of the said Court of Common Pleas of [Franklin] county, at Columbus, this — day of —, A. D. —.

L. H., Clerk.

8. *Replication to Assignment of Errors.*

A. B. }
v. } In Error.
C. D. }

And the said A. B., by E. F. his attorney, comes and says, that by reason of any thing above for error assigned, the judgment aforesaid ought not to be revoked, annulled or held for nothing ; because he says, that the said Robert Smith, in the plea aforesaid named, is yet living and in full life, to wit, at,

Coram Nobis, in Supreme Court.

[&c.,] without this that he, the said Robert Smith, before the trial of the issue aforesaid, died, in manner and form as the said C. D. hath above alleged. And this he, the said A. B., is ready to verify; wherefore he prays that the judgment aforesaid may be in all things affirmed, &c.

9. *Rejoinder.*

And the said C. D. as before says, that the said Robert Smith, before the trial of the issue aforesaid, joined in the said record between the parties aforesaid, died, in manner and form as he, the said C. D., hath above alleged; and of this he puts himself upon the country; and the said A. B. doth the like.

SEC. XVI. ERROR CORAM NOBIS IN THE SUPREME COURT.

We have already seen that writs of error coram nobis may be allowed by the Supreme Court.^a

The proceedings are in substance the same as upon the like writ in the Court of Common Pleas, given in the preceding section.

(a) 6 Ohio Rep. 518.

CHAPTER XXXIX.

CERTIORARI.

SECTION I. WHAT, AND IN WHAT CASES IT ISSUES.

II. FROM WHAT COURT A CERTIORARI MAY ISSUE.

III. CERTIORARI FROM THE SUPREME COURT TO THE COURT OF COMMON PLEAS.

1. Allowance and form thereof.
2. Service and return of the writ and the citation.
3. Further proceedings on the Certiorari.
4. Form of orders of Affirmance and Reversal.

IV. CERTIORARI FROM THE COURT OF COMMON PLEAS TO JUSTICES OF THE PEACE.

1. How sued out and within what time.
2. Form of allowance of a Certiorari.
3. Filing transcript — Certiorari bond.
4. The issuing and form of the writ.
5. The service of the writ, its return.
6. Notice of the issuing of the writ — assignment of errors, &c.
7. Judgments on Certiorari, and proceedings thereafter.

V. FORM OF CERTIORARI TO COUNTY COMMISSIONERS, AND FORM OF THE RETURN THERETO.

VI. CERTIORARI, AND PROCEEDINGS THEREON, UPON SUGGESTION OF DIMINUTION.

SEC. I. WHAT, AND IN WHAT CASES IT ISSUES.

In England a Certiorari is an original writ, issuing out of chancery, or the King's Bench, when the King would be certified of any record, in any other court of record. It is directed in the King's name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice

In what cases it lies.

before him, or such other justices as he shall assign to determine the cause.^b—It is often used in England for the purpose of removing a cause, pending before inferior tribunals, to the Court of King's Bench, that the same may be proceeded in and determined by that court.^b

In Ohio, however, the writ is not, in general, issued for the purpose of obtaining jurisdiction of a suit pending in an inferior tribunal; but is in the nature of a writ of error, and used for the purpose of revising the judgments of justices of the peace, the acts of courts of record, other than their common law proceedings, and the acts of public bodies, other than courts of law. Thus, it is issued to justices of the peace to revise their judgments;^c and to county commissioners;^d but not to review the proceedings of a city council^e in opening streets and in assessing damages and special taxes.

The acts of courts of common law, other than their common law proceedings, may be reviewed on certiorari; such as an application to redeem land sold for taxes;^f the proceedings of administrators in selling real estate;^g the order of the Court of Common Pleas confirming or setting aside a sale of real estate on an execution;^h the order of the Court of Common Pleas amercing the sheriff;ⁱ and proceedings under the bastardy act.^j

A certiorari is not the proper remedy to question the regularity of a sale or confirmation, made under a decree in chancery.^k The proper remedy in such case, is, by appeal.

Where the proceedings of an inferior tribunal, (such as the mayor of a city,) are absolutely null and void for want of jurisdiction, they cannot be reviewed on certiorari.^l

Motions to rescind former orders; to set aside levies; to amend pleadings, &c., are addressed to the sound discretion of the court; and unless that discretion be abused, or some rule of law violated, the Supreme Court will not disturb these orders of the Court of Common Pleas, on certiorari.^m

Judgments proper, of the Court of Common Pleas, cannot be reviewed upon certiorari: the remedy in such case being a writ of error.ⁿ

On certiorari to a judgment in attachment, it may be assigned for error in fact, that the defendant in the original suit, was actually a resident at the time the writ of attachment issued.^o

It will be perceived that in our practice, a certiorari performs the functions of, and is in fact a substitute for, a writ of error, in those cases in which a writ of error cannot be brought.

(b) Bac. Ab. Certiorari, (A)

(c) Const. of Ohio, Art. III, § 6.

(d) Swan's Stat. 803. § 49; 3 Ohio Rep. 383.

(e) 14 Ohio Rep. 240.

(f) 3 Ohio Rep. 277, 301.

(g) 7 Ohio Rep., part 2, 140; 15 Ohio Rep. 215.

(h) 9 Ohio Rep. 142; Wright, 574.

(i) 10 Ohio Rep. 45; 12 Ohio Rep. 220; Wright 720.

(j) 16 Ohio Rep. 56.

(k) 16 Ohio Rep. 274.

(l) 14 Ohio Rep. 240, 250.

(m) 3 Ohio Rep. 269; 4 Ohio Rep. 64; 420.

(n) 14 Ohio Rep. 240.

(o) 2 Ohio Rep. 27.

From what Court — From Supreme Court to Common Pleas.

Neither the proceedings of the Court of Common Pleas, nor of a justice can be brought under review by certiorari, until final order or judgment below.⁹

A certiorari will not lie upon the judgment of a justice, on account of the transcript omitting to state the form of the action, or because the justice neglects to send up a bill of particulars.⁹

It lies on the final decisions of justices, for fines, &c.⁹

SEC. II. FROM WHAT COURT A CERTIORARI MAY ISSUE.

The judges of the Court of Common Pleas, within their respective counties, have the same power with the judges of the Supreme Court, to issue writs of certiorari to justices of the peace, and to cause their proceedings to be brought before them.⁷

The Supreme Court, however, will not issue a certiorari to inferior jurisdictions, such as justices of the peace, except in extraordinary cases; the Court of Common Pleas generally, in practice, issuing the writ.⁸

Whenever the proceedings of the Court of Common Pleas is to be revised on certiorari, the writ is issued from the Supreme Court.

SEC. III. CERTIORARI FROM THE SUPREME COURT TO THE COURT OF COMMON PLEAS.

1. Allowance and Form thereof.

The first step to be taken by the party who desires a certiorari, is to procure from the clerk of the Court of Common Pleas an authenticated transcript of the proceedings to be reviewed. Annex to this an assignment of errors, in the same form as upon a writ of error.¹

An allowance of a certiorari from the Supreme Court is applied for in open court, or to a single judge, by producing an authenticated transcript of the proceedings below, with an assignment of the errors annexed thereto.

If the application is made in open court, the order of allowance is entered upon the minutes of the court, and may be in the form following:

Form of Journal Entry of Allowance of Certiorari.

A. B. }
 v. } Motion to amerce Sheriff of ——— County.
 C. D. }

On motion of the said C. D. a writ of certiorari is allowed in this case, returnable on ——— next.

(p) 14 Ohio Rep. 240.

(q) 15 Ohio Rep. 556.

(r) Const. Art. 3, sec. 6.

(s) 3 Ohio Rep. 383.

(t) See ante p. 1149, for the Form of the Assignment of Errors.

(u) 42 vol. Stat. 72, § 3.

From the Supreme Court to the Common Pleas.

Form of Allowance of Certiorari by a single Judge, indorsed on Transcript.

On application of C. D., I allow a writ of certiorari in this case, this — day of —, A. D. —, returnable on — next.

J. S., Judge of the Supreme Court.

Form of the Writ of Certiorari from the Supreme Court to the Court of Common Pleas.

The State of Ohio, — County, ss.

To the Honorable the Judges of the Court of Common Pleas within and for the County of —, Greeting :

[SEAL.]

We being willing, for certain causes, to be certified in our Supreme Court, of certain proceedings lately in our court before you, between A. B. and C. D., upon a certain motion of the said A. B., to [amerce the said C. D. as sheriff, or, upon a certain application of the said A. B., to redeem lands sold for taxes, &c., as the case may be,] do command you, that if final judgment be thereupon given, then without delay you send to us, in our said Supreme Court, within and for the said county of —, a certified transcript of the record of the judgment and proceedings aforesaid, with all things touching the same, as fully and entirely as they remain in our said Court of Common Pleas before you, by whatsoever names the parties may be called therein, together with this writ ; so that, having the same in our said Supreme Court on — next, at the court house in said county, we may further cause to be done thereupon what of right we shall see fit to be done.

Witness A. C., Clerk of our said Supreme Court, at —, this — day of —, A. D. —.

A. C., Clerk.

2. *Service and Return of the Writ, and the Citation.*

The writ of certiorari is handed, by the party suing out the writ, to the clerk of the Court of Common Pleas, who makes out a certified transcript of the proceedings of that court, in obedience to the writ, annexes to the writ the certified transcript, and the same is returned to the Supreme Court ; and at the same time issues a citation.

Form of the Return.

The answer of the judges of the Court of Common Pleas within named.

A certified transcript of the record of the judgment and proceedings within mentioned, with all things touching the same, as fully and entirely as they re-

From the Supreme Court to the Common Pleas.

main before us, is annexed to this writ and herewith returned, as within commanded.

Attest,

A. C., Clerk of ——— Com. Pleas.

Form of Citation.

[SEAL.] The State of Ohio, ——— County, ss.

To the Sheriff of said County, Greeting :

We command you, that you make known to A. B. of, [&c.,] that he be before the judges of our Supreme Court, within and for the said county of ———, at the court house in said county, on the first day of their next term, to show cause, if any there be, why the judgment of the Court of Common Pleas of said county, at the ——— term thereof, A. D. ———, upon a certain [motion to amerce, &c., *as the case may be,*] then pending in said court, between the said A. B. and C. D.; and which judgment, on the complaint of the said C. D., we have lately, by our writ of certiorari, caused to be brought into our said Supreme Court, should not be reversed, annulled, and altogether held for nothing, &c.

Witness A. C., Clerk of our said Supreme Court, at ———, this ——— day of ———, A. D. ———.

A. C., Clerk.

3. *Further Proceedings on the Certiorari.*

The mode of proceeding on a writ of error has already been stated.* The proceedings on a certiorari from the Supreme Court to the Court of Common Pleas, are, in general, the same as upon a writ of error.

4. *Form of Orders of Affirmance and Reversal.*

Order of Common Pleas Reversed, on Certiorari, in Supreme Court.

This cause came on to be heard upon the transcript of the proceedings in the Court of Common Pleas, and was argued by counsel; on consideration whereof, this court is of opinion that there is error in the proceedings and order of the said Court of Common Pleas, in this, to wit, That, [&c.]: Therefore, for the errors aforesaid, it is considered, that the order aforesaid, made by the said Court of Common Pleas, be and the same is hereby reversed, with costs, and that the said C. D. be restored to all things he has lost by reason of the same; and it is ordered, that a special mandate be sent down to the said Court of Common Pleas, to carry this judgment into execution.

(n) See ante p. 1145, et seq.

From the Common Pleas to Justices of the Peace.

Order of Common Pleas Affirmed, on Certiorari, in Supreme Court.

This cause came on to be heard upon the transcript of the proceedings in the Court of Common Pleas, and was argued by counsel; on consideration whereof, this court is of opinion that there is no error in the proceedings or order of the said Court of Common Pleas: Therefore it is considered, that the order aforesaid, made by the said Court of Common Pleas, be and the same is hereby confirmed, with costs, [&c. *Conclude as in the last Precedent.*] See Judgments in Error, ante p. 1151.

SEC. IV. CERTIORARI FROM THE COURT OF COMMON PLEAS TO JUSTICES OF THE PEACE.

1. *How sued out, and within what time.*

If a party desires to have the proceedings of a justice reviewed upon certiorari, he will obtain from the justice a certified transcript from the docket, and assign errors upon it. The assignment of errors may be in the form following:

Form of Assignment of Errors.

And the said A. B. now comes and says, that in the record and proceedings aforesaid, there is manifest error in this, to wit:

1. The justice erred in refusing to charge the jury that, [&c.]
2. The justice erred in charging the jury that, [&c.]
3. The justice erred in overruling the objection of the said A. B., and permitting W. W. to testify that, [&c.,] the said testimony being improper, illegal, and irrelevant.
4. The said judgment was given in favor of the said C. D., whereas, by the law of the land, it ought to have been given in favor of the said A. B.; wherefore the said A. B. prays that a certiorari, &c., may issue; that said judgment may be reversed, &c.

By J. L., his Att'y.

The party desiring the certiorari will then present the transcript, with the errors indorsed on it, to the Court of Common Pleas, if in session, and move the court for a certiorari. The application may, in general, be made to a single judge in vacation, at any time within fifteen days after the rendition of the judgment. But if the fifteen days have expired, then the party must make his application to the court.*

In general, a writ of certiorari may be allowed, if the judgment be not paid, within five years after its rendition, but not afterwards.

(a) Stat. 515, sec. 56.

From the Common Pleas to Justices of the Peace.

To all this, however, a certiorari in an action of forcible entry and detainer, or forcible detainer, is an exception; for the certiorari in these cases must be sued out within ten days after the rendition of the judgment.^b

2. *Form of Allowance of a Certiorari.*

Form of Allowance of a Certiorari by a Judge, in Vacation.

Let a writ of certiorari issue in the within case, upon the applicant giving bond and security according to law.

E. F., Judge, &c.

To the Clerk of — Com. Pleas.

Dated, &c.

If the writ be allowed by the court in term time, the entry upon the journal is thus:

Form of Allowance of Certiorari by the Court.

A. B. }
 v. } Certiorari.
 C. D. }

On motion to the court by Mr. O., counsel for the said A. B., and upon producing a transcript of the proceedings in this cause before E. F., justice of the peace of the township of — and county of —, and the court having inspected the same, and the errors thereupon assigned, it is ordered, that a certiorari be issued herein to the said E. F., returnable *at the next term*, upon the said A. B. giving bond and security according to law.

3. *Filing Transcript—Certiorari Bond.*

The certiorari will not be issued, although allowed, until a bond be given.

Where, therefore, the writ is allowed by a judge or the court, the transcript is filed with the clerk, who enters the cause upon the appearance docket and takes a bond, as follows:

Form of a Common Certiorari Bond.

Know all men by these presents, that we, C. D.^c and E. F., of the county of — and State of Ohio, are held and firmly bound unto A. B. of, [&c.,] in the penal sum of —^d dollars, to the payment of which, well and truly to be made,

(b) 41 vol. Stat. 78, 79, secs. 3, 4; Swan's applicant himself should execute the bond; 10 Ohio Rep. 445.

(c) It is not indispensably necessary that the (d) No amount is prescribed by statute.

From the Common Pleas to Justices of the Peace.

we do hereby jointly and severally bind ourselves, our heirs, executors and administrators. Sealed with our seals, and dated this — day of —, A. D. —.

The condition of the above obligation is such, that whereas the said C. D. hath this day obtained the allowance of a writ of certiorari, to remove into the Court of Common Pleas, of said county of —*, a certain judgment for the sum of — dollars, *damages*, and — dollars, costs, lately rendered against the said C. D. by E. F., a justice of the peace within and for the said county of —, in a certain action then pending before him, wherein the said C. D. was plaintiff and the said A. B. defendant: Now, if the said C. D. shall well and truly pay all the costs and charges which have accrued, or which may accrue, in the prosecution of said writ of certiorari, together with the amount of any judgment that may be rendered against the said C. D. on the further trial of said cause, after the said judgment of the said justice of the peace shall have been set aside or reversed, or upon and after the affirmance thereof in the said Court of Common Pleas, then this obligation shall be void; otherwise, in full force and virtue in law.

C. D., [Seal.]

E. F., [Seal.]

Approved.

G. R., Clerk — Com. Pleas.

Form of Certiorari Bond in an action of Forcible Entry and Detainer.

*Insert five hundred dollars^d for the amount of the penalty of the bond, and proceed as in the preceding form to the *, and then as follows:]* proceedings and a judgment, in an action of forcible entry and detainer, [*or say, forcible detainer, as the case may be,*] lately rendered against the said C. D., by [E. F.,] a Justice of the Peace of said county, wherein the said C. D. was defendant and A. B. was plaintiff:

Now if the said C. D. shall faithfully prosecute said suit; and, in case of failure, shall pay all costs, rents and damages, which may be assessed to the said A. B., according to the force, form and effect of the statute, in such case made and provided, then this obligation shall be void; otherwise in full force.

Approved,

C. D., [SEAL.]

E. F., [SEAL.]

G. R., Clerk — Com. Pleas.

4. *The Issuing and Form of the Writ.*

The bond being filed, a certiorari is issued to the justice of the peace for another transcript, in the form following:

From the Common Pleas to Justice of the Peace.

Form of a Writ of Certiorari.

The State of Ohio, — county, ss.

To E. F., Esq., a Justice of the Peace within and for the township of — and county aforesaid, Greeting :

We command you, that a certified transcript of the record and proceeding^s of a certain suit lately pending before you, wherein A. B. was plaintiff and C. D. was defendant, and wherein on — you rendered a judgment for the sum of — dollars, [damages,] and — dollars costs, in favor of the said A. B. against the said C. D., with all things touching the same, as fully as the same are now before you, you send, sealed and inclosed with this writ, to our Court of Common Pleas within and for the said county of — on the first day of their next term.

Witness F. C., Clerk of our said Court of Common Pleas, this — day of — A. D. —.

F. C., Clerk.

5. The Service of the Writ, its Return, Notice of the Issuing the Writ, Assignment of Errors, &c.

The writ is taken to the justice of the peace, by the party or his agent, who makes out a certified copy of the proceedings before him, and transmits the same, inclosed and sealed up with the writ, to the proper court.

After the writ has been issued, the plaintiff in certiorari must give written notice thereof, to the adverse party, his agent or attorney, if resident in the county, and this notice must be personally served by reading, or by copy left at the dwelling house or place of abode of such party ; but if the adverse party, his agent or attorney, be not a resident of the county, the notice must be given by advertisement, posted up in three of the most public places in the county. This notice must be given ten days before the term of the court to which the writ is made returnable ; but if that number of days does not intervene between the date and return of the writ, the court will make such order respecting the notice to be given, as they shall deem proper.*

Form of Notice.

To A. B.

Take notice that, at my instance, a writ of [certiorari] has been allowed and issued, to remove into the Court of Common Pleas of — court, a judgment rendered against me and in your favor, on — by E. F., a Justice of the Peace within and for the township of — and county aforesaid, for the sum

(e) Swan's Stat. 516, sec. 59, 60.

Judgments — Proceedings thereafter.

of — dollars, [damages,] and — dollars, costs ; and that, at the next term of said Court, I shall pray a reversal of said judgment.

C. D.

Dated, [&c.]

This notice may be served by the sheriff or any other competent person.

Upon the return of the writ and transcript by the justice of the peace, the plaintiff in certiorari, within the time limited by the rules of the court, assigns errors anew upon the transcript so returned, and the cause proceeds to a hearing, as in cases of writs of error.⁴

6. *Judgment on Certiorari and Proceedings thereafter.*

1. *Generally.* If the judgment of the justice is affirmed, the court render judgment against the plaintiff for costs of suit, and award execution therefor ; and thereupon order the clerk, to certify their decision to the justice, that he may proceed on the affirmed judgment ; or, the court may award execution to carry into effect the judgment of the justice, in the same manner as if the judgment had been rendered in the Court of Common Pleas.⁵

If, however, the judgment is reversed, the court render judgment of reversal, and “ for the costs that have accrued, up to that time, in favor of the plaintiff in certiorari, and award execution therefor ; ” and the cause is retained by the court for pleadings, trial, and final judgment, as in cases of appeal.⁶

I have quoted the language of the statute in relation to the costs on reversal. It seems to be the practice on reversal, to tax as well the costs in certiorari, as the costs below, against the defendant in certiorari. But the words of the statute, in analogy to the construction given by the Supreme Court to the statute in relation to costs on reversal in error, will admit of a more just interpretation ; that is to tax on reversal, the costs in certiorari only up to the time of the reversal,⁷ leaving the costs below to abide the event of the suit.

2. *In Actions of Forcible Entry and Detainer.*

Where the certiorari brings up proceedings in forcible entry and detainer, and the judgment of the justice is set aside or reversed by the court, the plaintiff in certiorari recovers all his costs up to the time of the reversal, and judgment is rendered therefor, with an award of execution.⁸

The court on reversal, retain the cause and proceed thereon to final judgment, as in the cases of appeal, at the return term of the writ of certiorari,

(d) For the form of Assignments of Error, see ante, p. 1171.

(e) Swan's Stat. 516, sec. 61.

(f) Id. Ib. sec. 62.

(g) See 16 Ohio Rep. 316 ; Swan's Stat. 681, sec. 122.

(h) Swan's Stat. 420, sec. 11.

Forms of Judgments.

unless, for good cause shown, the court continue the proceedings.¹ No pleadings seem necessary. The case is tried by a jury. If the jury find the defendant guilty of forcible entry and detainer, or forcible detainer only, judgment of restitution is rendered and for costs, and a writ of restitution is awarded, and execution for costs, returnable to the next term.¹

If the plaintiff in certiorari fail or neglect to prosecute the suit to final judgment, or if the judgment below is affirmed, the court, on motion of the defendant or his counsel, render judgment of affirmance and for costs; and award execution therefor as in other cases.* And thereupon, if the plaintiff in certiorari were the defendant below, the court, on motion, will empanel a jury to assess the value of the rents accrued and damages, if any, sustained from the day notice to quit was served, or if no notice was given, then from the time the plaintiff in certiorari was summoned in the proceedings below.¹ The court render judgment upon the verdict, and for the costs that accrued from the commencement of the proceedings below; ["but if such notice was not given, then costs shall be taxed only from the commencement of the proceedings in certiorari;"] and the court award execution and a writ of restitution."²

Form of Judgment of Affirmance.

A. B. }
v. } Certiorari.
C. D. }

This cause came on to be heard on the transcript herein, and was argued by counsel; on consideration thereof, it is ordered and adjudged by the Court, that the judgment of the justice set forth in said transcript, be, and the same is hereby affirmed; and that the said C. D. recover of the said A. B., his costs in certiorari herein, taxed at — dollars — cents,* and that execution issue for said costs.

The like with Award of Execution upon the Judgment of the Justice.

*Proceed as in the preceding form to the *, and then as follows:*] and it is further ordered that the said A. B. have execution herein against the said C. D., as well to recover said costs, as to carry into effect the judgment of said justice, in said transcript set forth, in the same manner as if said judgment had been rendered by this Court.

Judgment of Reversal.

A. B. }
v. } Certiorari.
C. D. }

This cause came on to be heard upon the transcript of the record and pro-

(i) Swan's Stat. 420, sec. 12.

(j) Id. Ib.

(k) Id. Ib. sec. 18.

(l) Id. Ib. sec. 14.

(m) Id. Ib. sec. 15. Query: whether that part of the statute which is in brackets is now in force: see 44 vol. Stat. 69.

Forms of Judgments.

ceedings before E. F., a Justice of the Peace within and for the township of — and county of —, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said E. F. be, and the same is hereby reversed, with costs; and it is further ordered, that execution issue herein against the said A. B., as well for his costs aforesaid, as for his costs before the said E. F., amounting in all to — dollars; and it is further ordered, that this cause be continued for trial and final judgment.

The judgment being thus reversed, the plaintiff in the court below becomes plaintiff in the Court of Common Pleas: a declaration is filed, and the cause proceeds on to trial, as if originally commenced in the Court of Common Pleas.

Verdict and Judgment on affirmance in an action of Forcible Entry and Detainer.

A. B. }
v. } On Certiorari.
C. D. }

This cause came on to be heard on the transcript herein, and was argued by counsel; on consideration thereof, it is ordered and adjudged by this court, that the judgment of the justice, set forth in said transcript, be and the same is hereby affirmed. And on motion of the said C. D. it is ordered, that a jury be empanelled to inquire into and assess the value of the rents accrued to him, and damages, if any, sustained by him in the premises, according to the statute in such case made and provided. And thereupon the jury being called, came, to wit: E. F., [&c.,] who being empanelled and sworn well and truly to inquire into and assess said rents and damages, on their oaths do find, that said rents accrued and damages sustained by the said C. D. in the premises, from and after the — day of —, at which time notice to quit was served on the said A. B., are — dollars.

It is therefore considered by the court, that the said C. D. recover of the said A. B. said sum of — dollars assessed as aforesaid, and also the costs that accrued from the commencement of the proceedings herein below, taxed to — dollars — cents; and that execution issue therefor; and also a writ of restitution to restore to the said C. D. possession of said premises.

SEC. V. FORM OF CERTIORARI TO COUNTY COMMISSIONERS," AND FORM OF RETURN THERETO.

[SEAL.] The State of Ohio, — county, ss.

To the County Commissioners of the county of —, Greeting:

We being willing for certain causes to be certified in our Court of Common

(n) There seems to be no statute authorizing an allowance of this writ otherwise than in term time.

Upon Suggestion of Diminution.

Pleas of the said county of —, of certain proceedings lately before you upon the petition of A. B., [&c.,] touching a certain road or highway leading from — to —, do command you that if your determination and judgment be thereupon given, then without delay you send to us, in our said Court of Common Pleas, a transcript, duly certified, of your proceedings, determination and judgment aforesaid, with all things touching the same, as fully and entirely as they remain before you, by whatever names the parties may be called therein, together with this writ, so that, having the same in our said Court of Common Pleas [on the first day of their next term,] at the court house in said county, we may further cause to be done thereupon what of right we shall see fit to be done.

Witness, A. C., clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk.

Form of the Return.

The Answer of the County Commissioners of the county of —, within named.

A certified transcript of the proceedings, determination and judgment within mentioned, with all things touching the same, as fully and entirely as they remain before us, is annexed to this writ and herewith returned, as within commanded.

Attest :

J. C., Auditor of — county.

SEC. VI. CERTIORARI AND PROCEEDINGS THEREON, UPON SUGGESTION OF DIMINUTION.

It sometimes happens that after a writ of error is sued out and error assigned, that it is found that there is some omission or defects in making up the record from the files of the court below,^o or from some other cause, which the clerk or the court below can supply; in which case a suggestion is made in the court of errors, of diminution—that is, defects in the record returned from the court below, is assigned, and thereupon a certiorari is allowed, for the purpose of procuring a corrected record.

In general, after the defendant in error has pleaded in *nullo est erratum*, no diminution can be alleged;^p but at any time pending a writ of error, whether before or after error assigned, or after in *nullo est erratum* pleaded, the court may, *ex officio*, at their discretion, award a certiorari.^q

(o) 7 Ohio Rep. (Part 1,) 257.

(p) 1 Salk. 269; Cro. Eliz. 84.

(q) 2 Ld. Raym. 1005; 2 Saund. 101, n. (a);

Stra. 440.

 Upon Suggestion of Diminution.

The court at any time may, *ex officio*, award a certiorari to inform their conscience, to affirm, but not to reverse a judgment.¹

Suggestion of Diminution.

A. B. }
 v. } In Error.
 C. D. }

And the said A. B. [*or* C. D.] now comes and suggests to the court here, that in the transcript of the record returned in this case from the Court of Common Pleas, there are certain defects, as follows, to wit, [*here set forth particularly the defects;*] wherefore the said A. B. prays the allowance of a certiorari for a true transcript of the record and proceedings of the court below, &c.

By J. S., his Attorney.

Order of Allowance.

C. D. }
 v. } In Error.
 A. B. }

On motion to the court, by Mr. O., counsel for the plaintiff in error, it is ordered that a certiorari issue to the Court of Common Pleas for a true transcript of the record and proceedings in this cause, in the said Court of Common Pleas, returnable on — next.

Form of Certiorari on Suggestion of Diminution.

The State of Ohio, — county, ss.

To the Honorable the Judges of the Court of Common Pleas within and for said county — Greeting :

Whereas, at the suit of C. D., suggesting to us that error had intervened, in the record and proceedings, and also in the giving of judgment, in a certain action of debt which was lately pending in our said court before you, wherein A. B. was plaintiff, and the said C. D. was defendant, we heretofore commanded you, that if judgment thereof was given, then without delay you should send to us, under the seal of your court, distinctly and openly, an authenticated transcript of the record and proceedings aforesaid, with all things concerning the same, so that we might have them in our Supreme Court, within and

 Upon Suggestion of Diminution.

for the said county of —, on the — day of —, at the court house in said county. And now, in behalf of the said C. D., it is shown to us, that though you may have sent to us, in our said Supreme Court, at the time and place aforesaid, an authenticated transcript of the record and proceedings aforesaid, in some part thereof; yet other parts of the same, and also other things touching them, still remain before you, to be sent; therefore we command you, that without delay you send to us, under the seal of your court, distinctly and openly, a transcript of the record and proceedings aforesaid, and also of all things touching them, which, as is before said, remain before you to be sent, and this writ; so that having the same in our said Supreme Court, at the court house aforesaid, on — next, we may cause to be done thereupon what of right and according to the laws of the land ought to be done.

Witness, [&c.]

This writ is taken to the clerk of the Court of Common Pleas, who makes out a corrected transcript of the original record, and certifies the same under the seal of the court, and then indorses the writ as follows:

The answer of the Judges of the Court of Common Pleas, within named.

A true transcript of the record and proceedings within mentioned, with all things touching the same, is herewith returned at the day and place within mentioned, in a certain record to this writ annexed, as within commanded.

Attest:

R. C., Clerk — Com. Pleas.

The writ thus indorsed, is annexed to the transcript, and filed with the clerk of the Supreme Court.

In England, a certiorari is often sent down to certify as to certain specific diminution or defects in the record. The form of such writ is as follows:

Form of Certiorari, on suggestion of Specific Diminutions.

The State of Ohio, — county, ss.

To the Honorable the Judges of the Court of Common Pleas within and for said county — Greeting:

Because in the record and proceedings, and also in the giving of judgment, in a certain action of debt, which was lately in our said court before you, wherein A. B. was plaintiff, and C. D. was defendant, error had intervened, as it is said, to the damage of the said C. D., a transcript of the record of which said proceedings and judgment before our Supreme Court in the said county of —, to correct the errors in the same, we have heretofore caused to be brought by our writ of error: and because the said Supreme Court, for certain reasons them moving, before they proceed in this behalf are willing to be informed whether these words, "his certain note," between this word, "by," and these words, "under his hand," are inserted in the said *first* count of the said declaration; and whether these words, "pay them," between these

Upon suggestion of Diminution.

words, "promise to," and these words, "or order," are inserted in said *second* count of the said declaration : and whether these words, "next term," between these words, "of our," and these words, "to answer," are inserted in the said writ of summons. [*Proceed in like manner to specify all the defects, omissions, mistakes, &c.*] Therefore we command you, that the record of the said *first* and *second* counts of the said declaration, and of the said writ of summons, being searched, what of said words so as aforesaid omitted or inserted therein, you shall find, to the Supreme Court aforesaid, you without delay certify, together with this writ.

Witness, [*&c.*]

This writ is delivered to the clerk of the Court of Common Pleas, who searches the record, and indorses upon the writ as follows :

The answer of the Court of Common Pleas within named.

We do hereby certify, that the record of the said *first* and *second* counts of the within named declaration, and of the within named writ of summons, being searched, we do find, that the words, "his certain note, between the word "by," and these words, "under his seal," in the said *first* count of the said declaration, are inserted ; and that these words, "pay them," between these words, "or order," and these words, "promise to," in the said *second* count of the said declaration, are inserted ; and that these words, "next term," between these words, "of our," and these words, "to answer," in the said writ of summons, are wholly omitted ; as we are within commanded.

Attest :

T. S., Clerk of — Com. Pleas.

The writ, thus indorsed, is filed with the clerk of the Supreme Court ; and the indorsement, in all the subsequent proceedings, is considered as part of the original transcript sent up with the writ of error.

CHAPTER XL.

APPEAL.

SECTION I. IN WHAT CASES AND TO WHAT COURT AN APPEAL IS ALLOWED.

II. WHEN AND HOW AN APPEAL FROM A JUSTICE OF THE PEACE PERFECTED, AND PROCEEDINGS IN CASE THE APPEAL IS NOT PERFECTED.

III. FORMS OF JOURNAL ENTRIES.

1. Appeal quashed.
2. Change of recognizance on appeal when surety wanted as a witness.
3. The like, when the recognizance is insufficient in form or amount.
4. Transcript filed by appellee, and judgment thereon.
5. Transcript filed by appellee, and suit dismissed.
6. Appellant nonsuited, and judgment for appellee.

SEC. I. IN WHAT CASES AND TO WHAT COURT AN APPEAL IS ALLOWED.

No appeal lies from any court, to the Supreme Court, in any action or proceeding at law.^a

The act^a defining the powers of justices of the peace, in civil cases, provides "that an appeal shall be allowed to the Court of Common Pleas from the final judgment of any justice of the peace rendered under the provisions of that act, except from judgments rendered on confession."^a

No appeal is allowed from the trial of the right of property taken on execution by a constable or a sheriff.^b

Some statutes impose fines or penalties, and authorize an action of debt to be brought for the same; other statutes authorize individuals or public officers to sue in their own name for such fines or penalties. In all these cases, an appeal is allowed, if no express prohibition is interposed by the legislature in the statute creating the offence.^c It has therefore been held, that an appeal lies from the judgment of a justice rendered in an action of debt brought by the

(a) 43 vol. Stat. 80, § 2.

(a) Stat. 512, § 40.

(b) 8 Ohio Rep. 370.

(c) 5 Ohio Rep. 442, *Per Wright, J.*; 1d. 270; Wright's Rep. 314. An appeal is allowed in all actions which are in form, civil.

In what cases allowed.

supervisor of roads to recover the penalty imposed by statute, for obstructing a highway.^d But no appeal is allowed in ordinary criminal prosecutions instituted in the name of the State, to punish individuals for a violation of a criminal law, unless the statute creating the offence, expressly allows an appeal.

No appeal is allowed from the judgment of a justice rendered on an award, unless the party praying the appeal file an affidavit with the justice, setting forth that the award was obtained by fraud, corruption, or other undue means.^e

When a judgment is obtained before a justice against a surety for the debt of the principal debtor, and the former obtains a judgment against the latter for the same debt, the principal debtor cannot appeal from the last mentioned judgment.^f So, no appeal lies from a judgment rendered in an action of forcible entry and detainer.^g

The entry of bail for the stay of execution does not prevent the defendant from appealing from the judgment, as in other cases.^h

When there has been a jury trial before a justice, and neither party claimed more than twenty dollars, and a recovery is had for no more, it would seem that no appeal can be had.ⁱ But if either party *claimed* before the justice more than twenty dollars, (the plaintiff by his bill of particulars, or the defendant as a set off,) either party, it seems, may appeal a jury case.^j

An appeal lies to the Court of Common Pleas from a justice of the peace, in proceedings in attachment, against absent or absconding debtors;^k or against water craft by name;^l and in replevin.^m

Appeals may be taken to the Court of Common Pleas, from the judgments of mayors of towns and cities, in the same manner as from the decisions of justices of the peace.ⁿ

So, an appeal lies to the Court of Common Pleas from the decision of commissioners, appointed to determine on the validity, &c., of claims, against a decedent's insolvent estate.^o

So, if any person conceives himself aggrieved by the decision of the county commissioners, in any case, he may take an appeal to the Court of Common Pleas.^p Thus, if the county commissioners employ a person to build a bridge, and refuse to allow his claim.^q So, if a person is aggrieved by the decision of the county commissioners in laying off a State or County road,^r or vacating, altering or reviewing any State or County road, or in the final decision of the commissioners in relation to damages in that behalf, an appeal lies to the Court of Common Pleas.^s

(d) 5 Ohio Rep. 442.

(e) Swan's Stat. 512, § 36.

(f) Id. 878, § 5.

(g) Id. 419, § 9.

(h) Wright's Rep. 314.

(i) Swan's Stat. 544 § 129; 43 vol. Stat. 57.

(j) 43 vol. Stat. 57.

(k) Swan's Stat. 82, 83.

(l) Id. 211.

(m) 44 vol. Stat. 42.

(n) Swan's Stat. 946, § 12.

(o) Id. 377, 378.

(p) Swan's Stat. 207. For the mode of taking and perfecting such appeal, &c., see Id. Ib.; 5 Ohio Rep. 490.

(q) 5 Ohio Rep. 490.

(r) Swan's Stat. 792, § 11.

(s) Id. 802, § 47.

(t) Id. 802, § 47. As to the mode of taking the appeal in such cases, and the proceedings thereon, &c., see Id. 802, 803, § 47, 48, 50, 51.

From the Judgment of Justices.

An appeal lies to the same court, from the final decision of the trustees of a township, in regard to a township road.^a

So, an appeal lies in certain cases on contested elections.^v

SEC. II. WHEN AND HOW AN APPEAL FROM A JUSTICE OF THE PEACE PERFECTED; AND PROCEEDINGS IN CASE THE APPEAL IS NOT PERFECTED.

An appeal can be taken within ten days from the rendition of judgment, and not after. Within that time the party appealing must enter into a recognizance to the adverse party, with at least one good and sufficient surety, (who must sign his name to such recognizance,) in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs; conditioned for the payment of the debt, or damages and costs, that have accrued or may be adjudged against the appellant in the court of common pleas.^w If the term of office of a justice expire during the ten days allowed for taking an appeal, he may, notwithstanding, take the recognizance, and give a transcript of the judgment.^x

The justice must make out a certified transcript of his proceedings, including the recognizance of bail taken on such appeal, and must, on demand, deliver the same to the appellant or his agent.^y

It is also the duty of the justice to deliver or transmit to the clerk of the court to which the cause is appealed, on or before the second day of the term, the bill or bills of particulars, the depositions, the note, contract, writings, and all other original papers, if any, used on the trial before him.^z

All proceedings before the justice cease, and are stayed from the time the recognizance is entered into;^a and if an execution is out on the judgment, it must be recalled,^b by giving the party appealing an order, directed to the constable, requesting the latter to return the writ, &c.^c

After an appeal bond has been duly entered into, the justice has nothing further to do with the cause, until he receives a certificate from the clerk of the court.

The party appealing, or his agent, must deliver the transcript to the clerk of the court, on or before the second day of the term, next following such appeal,^d otherwise the appellant will fail in perfecting his appeal. Cases, however, occur, in which the Court of Common Pleas allow an appeal to be docketed on a day subsequent to the second day of the term, where the omission has arose from accident or mistake, and without the neglect of the appellant, or by the contrivance of the appellee.^e

(u) Id. 805, § 59. For the mode of taking the appeal and proceedings thereon, see Id. lb.

(v) Id. 314, 315.

(w) Swan's Stat. 512, § 41.

(x) Id. 526, § 108.

(y) Id. 513, § 42.

(z) Id. lb.; Id. 530, § 115

(a) Id. 517, § 68.

(b) Wright's Rep. 163.

(c) Swan's Stat. 513 § 42.

(d) 6 Ohio Rep. 33; Wright, 568.

From the Judgment of Justices.

The clerk, on receiving the transcript and other papers, files the same, and docketts the appeal.^a

The plaintiff in the court below, becomes the plaintiff in the Court of Common Pleas; and the parties proceed, in all respects, in the same manner, as though the suit had been originally instituted there.^b

The term at which the appeal is docketed, is considered the appearance term; and the parties make up their pleadings precisely as if the cause had been originally brought, by summons, returned served, to that term. The commencement of the declaration, and matters relating to the form of the action, have already been noticed.^c

Upon appeal, the plaintiff is confined in the items of his claim, to the bill of particulars filed before the justice.^d

If the appeal be irregularly taken, the defendant may move to quash the appeal. This motion should generally be made at the term in which the appeal is filed; for, after the defendant has plead to the action, he, in general, thereby waives the irregular manner in which his appearance in court was effected.

The reason for quashing an appeal must be stated in the order.^e

The neglect of the justice to send up the bill of particulars, is, it seems, no ground for quashing an appeal; at most, it is said, it only affords ground for a nonsuit.

If the appeal be quashed for want of jurisdiction in the justice, there can be no judgment for costs.^f

When the surety in the recognizance of appeal is insufficient, or his testimony is required by the appellant, or the recognizance is insufficient in form or amount, the Court of Common Pleas, on motion, will order a change or renewal of such recognizance, and direct that the same be certified to the justice, or that it be recorded in the court.^g

Verdicts and judgments, on the issues made by the pleadings, are precisely the same as in actions originally brought in court. Questions as to the costs on appeals have already been stated.^h

If the appellant fail to deliver the transcript, and other papers if any, to the clerk, and have his appeal docketed as above mentioned, on or before the second day of the term, the appellee may, at the same term, file a transcript of the judgment below; and, on his motion, the court will docket it, and enter up a judgment in his favor, similar to that entered by the justice, and for all the costs that have accrued in court, and award execution thereon; or, the court, at the instance of the appellee, will, in such case, dismiss the appeal, at the costs of the appellant, and remand the cause to the justice, to be proceeded in as if no appeal had been taken.ⁱ

(a) Swan's Stat. 513 § 43.

(b) *Id.* § 44.

(c) See ante, 188, and notes.

(d) 6 Ohio Rep. 388.

(e) Swan's Stat. 514, sec. 51.

(f) 15 Ohio Rep. 556.

(g) Wright 417; 4 Ohio Rep. 200.

(h) Swan's Stat. 514, sec. 52.

(i) See ante, p. 993.

(j) Swan's Stat. 513, sec. 45.

From the Judgment of Justices.

If the plaintiff below appeals, and files the transcript, and then fails to declare or otherwise neglect to prosecute the suit to final judgment, and so, becomes nonsuit, the court will render judgment against him for the amount rendered against him by the justice, together with interest and costs, and award execution as in other cases.^k

If both parties fail to enter the appeal, during the term next after the appeal taken below, the clerk certifies the fact to the justice; or, if the appeal was entered and dismissed, he so certifies; and thereupon the justice, on receiving the certificate, issues execution on the judgment.^l

So, if the appeal is quashed by reason of any irregularity in entering it a transcript of the order is lodged with the justice, who then issues execution on the judgment.^m

In general, the appellee files the transcript and takes a judgment, where the appellant fails to enter the appeal; for, the surety in the recognizance of appeal is not liable, if the appellant fails to enter the appeal, unless the appeal is dismissed, or judgment is entered, in the Court of Common Pleas, against the appellant.ⁿ

SEC. III. FORMS OF JOURNAL ENTRIES.

1. *Appeal Quashed.*

On motion to the court by Mr. O., counsel for the appellee, it is ordered, that the appeal taken in this cause be and the same is hereby quashed, for the reason [*here state the reason as thus*: that the recognizance was not taken within ten days from the rendition of the judgment:] Whereupon it is considered, that the appellee recover of the appellant his costs herein expended, taxed to ——— dollars.^a

2. *Change of Recognizance, on Appeal, when Surety wanted as a Witness.*

On motion to the court by Mr. O., counsel for the appellant, and it appearing to the satisfaction of the court that the testimony of T. W., who is security in the recognizance for the appeal of this cause, is required by the appellant, it is thereupon ordered, that said recognizance be changed, and that X. Y. be substituted in the place of the said T. W.; and thereupon the said X. Y. ap-

(k) Id. 514, sec. 46.

(l) Id. Ib., sec. 47.

(m) Id. Ib., sec. 51.

(n) Id. Ib., sec. 49.

(a) The cause for quashing the appeal must be stated in the order; Swan's Stat. 514, sec. 51.

A copy of this order is lodged with the justice, who thereupon issues execution in the same manner as if no appeal had been taken; Ibid. If an appeal be quashed for want of jurisdiction in the justice, there can be no judgment for costs; Wright, 417.

Forms of Judgments, &c.

peared in open court, and acknowledged himself to be indebted to the said A. B. in the sum of — dollars, conditioned for the payment of the debt or damages, and costs that have accrued, or that may be adjudged against the appellant in this court; and it is further ordered, [that the recognizance of the said X. Y. be certified to A. S., the justice of the peace from whose judgment this cause was appealed; or say, that the recognizance of the said X. Y. be recorded in this court.]

3. *The like, where the Recognizance is insufficient in Form or Amount.*

On motion to the court by Mr. O., counsel for the appellant, and it appearing to the satisfaction of the court, that the recognizance for the appeal of this cause is insufficient, in [form or amount, as the case may be,] it is thereupon ordered, that said recognizance be renewed; and thereupon X. Y. appeared in open court, and acknowledged himself to be indebted, [&c. Conclude as in last Precedent.

4. *Transcript filed by Appellee, and Judgment thereon.*

A. B. this day filed a transcript of the proceedings and judgment of A. S., a Justice of the Peace of — township, in a certain cause wherein the said A. B. was plaintiff and C. D. defendant, and which cause was appealed to this Court by the said C. D., and thereupon on motion of the said A. B. by Mr. O., his counsel, and it appearing to the satisfaction of the Court that the said C. D. has failed to deliver a transcript of the proceedings and judgment aforesaid to the clerk of this Court, and to cause his said appeal to be docketed, within the time required by law, it is ordered, that said cause be docketed in behalf of the said A. B., and thereupon, on motion of said A. B.,* it is considered by the Court, that the said A. B. recover of the said C. D. the sum of [the amount of the judgment below] dollars, together with his costs in this Court expended, taxed to — dollars.

5. *Transcript filed by Appellee and Suit dismissed.*

*Proceed as in the last precedent to the *.*] It is ordered that said appeal be dismissed, and that said cause be remanded to the said Justice of the Peace to be proceeded in as if said appeal had not been taken; and it is considered that the said appellee recover of the appellant his costs herein, taxed to — dollars — cents.

Form of Judgment.

6. *Appellant Nonsuited and Judgment for Appellee.*

' This day came the said A. B. by his attorney, and the said C. D. being called, came not, nor does he further prosecute his suit ; therefore it is considered, that the said A. B., (the appellee,) recover of the said C. D. the sum of —— dollars, [*the amount of the Justice's judgment with interest,*] together with his costs in this behalf expended, taxed to —— dollars.

CHAPTER XLI.

ATTACHMENT AGAINST DEBTORS.

- SECTION**
- I. IN WHAT CASES AN ATTACHMENT MAY ISSUE.**
 - II. THE PRÆCIPUE AND AFFIDAVITS TO PROCURE PROCESS AND THEIR FORM.**
 - III. THE ISSUING AND FORM OF THE WRIT OF ATTACHMENT.**
 - IV. THE SERVICE AND RETURN OF THE ATTACHMENT, WHEN NO ONE PREFERS A CLAIM TO THE PROPERTY ATTACHED.**
 - V. THE MODE OF PROCEEDING AND FORMS, WHEN THE PROPERTY ATTACHED IS CLAIMED BY A THIRD PERSON.**
 - VI. THE SERVICE OF PROCESS AGAINST A GARNISHEE, WITH FORMS.**
 - VII. PROCEEDINGS AT THE FIRST OR RETURN TERM OF THE ATTACHMENT.**
 - VIII. PROCEEDINGS AT THE SECOND TERM.**
 - IX. PROCEEDINGS AT THE THIRD TERM.**
 - X. HOW PROPERTY IN THE HANDS OF THE OFFICER DISPOSED OF, AND THE PROCEEDS APPLIED, WITH FORMS.**
 - XI. PROCEEDINGS AGAINST THE GARNISHEE, AFTER JUDGMENT IN THE ORIGINAL ACTION, WITH FORMS.**
 - XII. WHEN AN ATTACHMENT MAY BE ISSUED TO ANOTHER COUNTY, AND THE PROCEEDINGS THEREON.**
 - XIII. THE EFFECT OF THE DEATH OF A DEFENDANT.**
 - XIV. THE EFFECT OF AN ATTACHMENT HAVING PREVIOUSLY BEEN ISSUED BY A JUSTICE OF THE PEACE.**
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SEC. I. IN WHAT CASES AN ATTACHMENT MAY ISSUE.

Attachment is a proceeding, by which the property and effects of an absconding debtor, or a non-resident of the state, are subjected to seizure and sale, for the payment of his debts.*

The remedy is applicable only, where the relation of debtor and creditor subsists, and to cases arising out of, founded upon or sounding in contract; or upon a judgment or decree of some court of law or chancery.*

(a) Swan's Stat. 88, sec. 1.

(b) Id. 91, sec. 9.

The party sued must be either a non-resident of the state, or an absconding debtor.^c

A creditor is not authorized to resort to process of attachment against joint debtors, unless they are all non-residents, or have absconded. So long as one of the joint debtors remains within the jurisdiction, and can be personally served with process, the creditor must resort to a common law action.^d

When however, two or more are jointly bound or indebted, either as joint obligors, partners or otherwise, the writ of attachment may be issued against the separate or joint estates, or both of such debtors, in any time, in the same manner and under the same restrictions as is provided by law in other cases.^e

The statute is silent as to foreign corporations.

SEC. II. THE PRÆCIPE AND AFFIDAVITS TO PROCURE PROCESS AND THEIR FORM.

No writ of attachment can issue until the proper affidavit is filed with the clerk of the court.

This affidavit may be made by the creditor, (and whether a non-resident or not,) or his agent or attorney; and before any officer authorized, generally, to administer oaths.^f

The affidavit must set forth, that the debtor hath absconded, to the injury of his creditors; or, that such debtor is not a resident of the state, as the affiant verily believes.^g

If the creditor intends to obtain property in the hands of a third person, belonging to the debtor; or intends to proceed against a person who owes the debtor, either the creditor, or some other credible person, must make oath, that he has good reason to believe, and does believe, that such third person has property in his possession, belonging to the defendant in attachment. The property must be described in the affidavit.^h

The person who owes, or has property of the defendant in his possession, is called the garnishee.

If the creditor, or other credible person will file an affidavit, setting forth that he has good reason to, and does really believe, that such garnishee will abscond before judgment and execution can be had against him, or that any other person (naming him) hath any property, moneys or credits of the defendant in his possession, or is indebted to the defendant, and he is in fear such other person will abscond, as above mentioned, the statute provides, that the plaintiff may institute a suit by *capias ad respondendum* against such garnishee, or other person who may be held to special bail; and points out the mode in which such suit by *capias* may be conducted.ⁱ But as these provis-

(c) Swan's Stat. 88, sec. 1.

(d) 4 Ohio Rep. 132, 149.

(e) Swan's Stat. 98, sec. 13.

(f) Id. 88, sec. 1.

(g) Id. 89, sec. 5.

(h) Id. 89, 90, sec. 5.

Form of Præcipe and Affidavit.

ions of the statute were enacted prior to the non-imprisonment act, the courts only can determine whether the last mentioned law has been repealed.¹ Probably not.

Form for Præcipe and Affidavit for a Writ of Attachment.

A. B. } In Assumpsit, [or debt, as the case may be;
v. } stating the damages, or debt and damages,
C. D. } as in preceding forms, ante 107, 108.

Issue a writ of attachment, returnable at next term. Indorse, suit brought for, [&c., stating the cause of action as directed in preceding forms, ante 133 to 139.

To the Clerk of ——— Com. Pleas.

J. S., Attorney for Plaintiff.

[Date.]

The State of Ohio, }
——— County, ss. }

The above named A. B. makes oath and says, [or if the affidavit be made by an agent or attorney, say: 'T. P. makes oath and says, that he is the agent, [or attorney] of the above named A. B., and duly authorized to collect the above mentioned debt and] that the above named C. D. is justly indebted to the said A. B. in the sum of ——— dollars and more, and in the manner described in the above præcipe; and that the said C. D. [hath absconded to the injury of his creditors, or say, is not a resident of the state of Ohio,] as he, the said [A. B. or T. P.] verily believes.

Sworn to, and subscribed before me,
this ——— day of ——— A. D. ———.

Signed.

T. P., Justice Peace ——— County, Ohio.

If you proceed against a garnishee, add to the above form, after the words "verily believes," the following:] And the said A. B. makes oath and further says, that he has good reason to, and does verily believe, that G. G., residing in ———, has in his possession the following property, belonging to the above named C. D., to wit: [*Here describe the property.*]

The affidavit against the garnishee may be filed separately, at any time before the writ of attachment is returned; and when filed separately, or after the writ of attachment is issued, may be in the form following:

(i) See Id. Ib. 646.

Form of Affidavit against a Garnishee.

A. B. }
 v. } — Com. Pleas. In Attachment.
 C. D. }

The above named A. B. [*or other credible person*] makes oath and says, that he has good reason to, and does verily believe, that G. G. has in his possession the following property, belonging to the above named C. D., to wit :—
 [*Here describe the property.*]

Signed.

Sworn to and subscribed, [&c.]

SEC. III. THE ISSUING AND FORM OF THE WRIT OF ATTACHMENT.

If the clerk of the court issues the writ, without an affidavit filed, such writ will be quashed at his costs.¹

The writ is directed to the sheriff or coroner, (as the case may require,) commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of the defendant, wheresoever they may be found.

Form of the Writ of Attachment.

[SEAL.] The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting :

We command you to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of C. D., wheresoever they may be found, and the same to keep, or so to provide that the same, or the value thereof, may be forthcoming, to answer the judgment of our Court of Common Pleas, within and for the said county of —, in a certain action *on the case*, therein prosecuted by A. B. against the said C. D., for — dollars damages ; and in what manner you shall execute this writ, make appear to our said Court of Common Pleas, on the first day of their next term ; and have you then there this writ,

Witness, T. T., Clerk of our said Court of Common Pleas, this — day of —, A. D. —.

T. T., Clerk.

SEC. IV. THE SERVICE AND RETURN OF THE ATTACHMENT, WHEN NO ONE PREFERS A CLAIM TO THE PROPERTY ATTACHED.

If the attachment was issued at the suit of a person who is not a freeholder or a resident of the county, the sheriff is not bound to serve it, unless it is indorsed by some freeholder of the county, as security for costs.²

(j) Swan's Stat. 88, sec. 1.

(k) Id. 88, sec. 1.

The Service of the Writ — Inventory — Redelivery Bond.

When the officer serves the writ, he must have two freeholders of the county with him, and attach the property in their presence. The statute prescribes the mode in which this is to be done, thus: The officer with the writ in hand, and the property before him, should make the following declaration, in the presence of the two freeholders: "By virtue of this writ, I attach this property at the suit of A. B."

The officer will then administer to the two freeholders an affirmation, or an oath, in the form following:

You do each solemnly swear, in presence of Almighty God, that you will make a true inventory and appraisement of all the property attached by me, in your presence, at the suit of A. B.

The officer and freeholders will then proceed to inventory, and appraise the property attached, making out the same in the form following:

Form of the Inventory of Property Attached.

An inventory and appraisement of property attached by S. S., sheriff of — county, at the suit of A. B. against C. D., by virtue of a writ of attachment issued out of the Court of Common Pleas of said county, made this — day of —, A. D. —, by the said sheriff, and E. F. and G. H., two freeholders of said county, the said E. F. and G. H., in whose presence the said property was attached, being first duly sworn [or affirmed] by said sheriff, as the law directs, to wit:

	Dols.	Cts.
One sorrel horse, appraised at - - - -	50	00
One two horse wagon, " " - - - -	25	50

One hundred acres of land, situate in said county of —, and bounded and described as follows: [Here insert the boundaries, &c. If the title be an equitable one, or a leasehold or other estate, so state.]

[Signed]

S. S., Sheriff of — Co.

E. F.

G. H.

The property attached remains in the hands of the officer, unless the garnishee, in whose possession it may be found, shall give bond to the officer, with two sufficient sureties, freeholders of the county, in double the appraised value thereof, with condition that the same property, or its appraised value in money, shall be forthcoming, to answer the judgment of the court. If the property is lost or destroyed, however, by unavoidable accident, the court will remit the value thereof, to the obligors in the bond.

The bond may be in the form following:

Form of Bond to the Sheriff upon Redelivery of Property.

Know all men by these presents, that we, T. F., E. F. nad G. F., [two freeholders of the county] are held and firmly bound unto T. S., sheriff of the

 Sheriff's Return.

county of —, in the State of Ohio, in the penal sum of — [*double the appraised value of the property*] dollars, for the payment of which, well and truly to be made, we do by these presents jointly and severally bind ourselves. Sealed with our seals, and dated this — day of —, A. D. —.

The condition of the above obligation is such, that, whereas, by virtue of a writ of attachment issued from the Court of Common Pleas of the said county of —, against C. D. at the suit of A. B., bearing date the — day of —, A. D. —, the said sheriff hath seized upon and taken the following property, in the possession of the said T. F., to wit, [*description*] and which has been appraised, according to law, to — dollars, and upon the ensealing of these presents is redelivered to the said T. F. Now, if the said property above described, or its appraised value in money, shall be forthcoming to answer the judgment of said court, then this obligation shall be void; otherwise in full force.

T. F., [Seal.]

E. F., [Seal.]

G. F., [Seal.]

Form of Sheriff's Return.

[Annex the inventory and appraisement to the writ, and then indorse on the writ the following return:]

July 1, 18—. Having this writ, I went to the place where the defendant's property, described in the annexed inventory and appraisement, was situate, and then and there, in the presence of E. F. and G. H., two freeholders of the county of —, named in said inventory, attached, and did declare in their presence and hearing, that by virtue of said writ I attached said property; and I did then, with said two freeholders, after administering to them an oath truly to inventory and appraise said property, make a true inventory and appraisement of all the property attached, and which said inventory and appraisement, signed by me and said freeholders, is annexed to, and returned with this writ.* Said property [now remains in my hands; or say, if the fact be so,] was delivered to G. G., in whose possession it was found, upon bond and security given by him, as required by law.

S. S., Sheriff of — Co.

[Date.]

SEC. V. THE MODE OF PROCEEDING AND FORMS WHERE THE PROPERTY ATTACHED IS CLAIMED BY A THIRD PERSON.

The officer, after attaching the property, and having the same inventoried and appraised in the mode pointed out in the preceding section, will then attend to the demands of claimants of the property.

Proceedings when a third person claims the Property.

If any of the property attached is claimed by any person, other than the defendant, the officer must forthwith give notice in writing, to some justice of the peace of the county, in which he must set forth the names of the plaintiff and defendant in attachment, the name of the person or persons claiming, and also a schedule of the property claimed.¹

This notice and schedule may be in the form following :

Form of Notice by Sheriff that Property attached is claimed by a third person.

A. B. }
v. } In Attachment, pending in ——— Com. Pleas.
C. D. }

To G. H., Esq., Justice of the Peace in and for ——— county :

You are hereby notified, that I have attached, by virtue of a writ of attachment issued by the Court of Common Pleas of said county, at the suit of the above named A. B., against said C. D., certain property as belonging to said C. D., [part of] which property is claimed by one C. C. The following is a schedule of the said property claimed by said C. C., to wit: [*here describe the property in the same manner as in the inventory.*]

S. S., Sheriff of ——— county.

[Date.]

The officer retains possession of the property, unless he receives an order of restitution from the justice. If such order is received, the officer will deliver up the property to the claimant, taking his receipt and retaining the order of restitution.

If, however, an appeal is taken and bail given on the appeal within five days after the judgment of the justice is rendered, the officer may deliver over the property to the claimant, if he will enter into bond to the officer in double the appraised value of the property, with one or more sureties, approved by the officer, conditioned that the same property, or the appraised value thereof, in money, shall be forthcoming to answer any judgment that may be recovered by the plaintiff or other creditor against the defendant in attachment, in case the right to such property, or any part thereof, shall be determined against said claimant.²

The bond of the claimant may be in the form following :

Form of Bond made by the claimant of Property attached, to the Sheriff, when the trial of the Right of Property is appealed to the Court of Common Pleas.

Know all men by these presents, that we, C. C., E. F. and G. H., are held and bound to S. S., sheriff of ——— county, Ohio, in the sum of [*here insert*

(1) Swan's Stat. 90, sec. 7.

(m) Id. 91, sec. 8.

Proceedings when a third person claims the Property.

double the appraised value of the property claimed,] for the payment of which we do hereby jointly and severally bind ourselves. Sealed with our seals, and dated this — day of —, A. D. —.

The condition of the above obligation is such, that whereas, by virtue of a certain writ of attachment issued from the Court of Common Pleas of said county, at the suit of A. B. against C. D., the said sheriff attached the following described property as the property of the said C. D., which was claimed by the said C. C., and which was appraised as follows, to wit: [*describe the property as in the inventory, with the appraised value.*] And whereas, such proceedings were duly had upon the trial of said claim before G. H., esquire, justice of the peace of said county, that judgment was rendered in the premises against said claimant, from which judgment said C. C. appealed to the said Court of Common Pleas, and entered bail as required by law.

Now, if the said property above described, or the appraised value thereof, in money, shall be forthcoming to answer any judgment that may be recovered by the said A. B. or other creditor of C. D., against the said C. D., the defendant in said attachment, in case the right to said property, or any part thereof, shall be determined against the said C. C., then this obligation to be void, otherwise in full force.

[Signed]

[SEAL.]

[SEAL.]

[SEAL.]

Upon the appeal of the claimant, he is the plaintiff in the Court of Common Pleas, and declares in trover; and the special matter may be given in evidence."

Form of the Return of the Sheriff where property attached is claimed by a third person.

Proceed as in the preceding form, ante, p. 1194, to the asterisk, and then as follows : of the property so attached, C. C. claimed the following: [*here describe the property attached in like manner as described in the inventory.*] Gave immediate notice of said claim, with a schedule, &c., to G. H., a justice of the peace of said county. Oct. 23, 1857, I received the order of restitution hereunto annexed, and in pursuance thereof, delivered said property to said C. C., *or if the fact be so, add,* the said C. C. [*or C. D.*] having taken and perfected his appeal from the judgment of said G. H. upon the trial of said claim, said property claimed was delivered to said C. C. upon bond and security given by him, as required by law.]

S. S., Sheriff of — county.

[Date.]

SEC. VI. THE SERVICE OF PROCESS AGAINST A GARNISHEE, WITH FORMS.

We have already seen, that in order to proceed against a third person, who owes the defendant in attachment, or who has property in his possession belonging to the defendant, it is necessary to file an affidavit to that effect, the form of which has already been given.^p

A copy of this affidavit is placed in the hands of the officer who has the writ, and if the officer can come at the property, he attaches it under the writ of attachment, and the garnishee is not served with any process or notice. But if the officer cannot come at the property, he must leave with the garnishee as well a copy of the writ of attachment, as the affidavit, indorsing on each copy the words, "A true copy. Attest: S. S., sheriff of — county." The officer must also leave with the garnishee a written notice, that he appear in court at the return of the writ. This notice may be in the form following:

Form of Notice to the Garnishee.

To G. G.:

You are hereby notified to appear in the Court of Common Pleas of — county, on the return day of the writ of attachment, a copy of which is herewith delivered to you, to wit, on the first day of the next term of said court.

S. S., Sheriff of — county.

[Date.]

The return of the sheriff, so far as respects a garnishee, may be in the form following:

Form of Return by Sheriff when Garnishee is served.

[Annex to the writ the attested copy of the affidavit, and a copy of the notice to the garnishee.]

I could not come at [thus in statute] the property alleged to be in the possession of G. G., [the name of the garnishee,] and, October 23, 1857, I left with said G. G., [or, at his usual place of residence, he being absent,] a copy of this writ, and of the affidavit and notice hereunto annexed.

S. S., Sheriff of — county.

[Date.]

SEC. VII. PROCEEDINGS AT THE FIRST, OR RETURN TERM OF THE ATTACHMENT.

If no property is attached, or none remains liable to the attachment, no further proceedings can be had in the case.^o

(o) 7 Ohio Rep. (part 1,) 273; and see 9 Ohio Rep. 108; 17 Ohio Rep. 409. (p) See ante, 1190.

Proceedings at the return Term.

The attorney for the plaintiff must see that an advertisement, stating the names of the parties, the time when, from what court, and for what sum, the writ issued, is inserted in a newspaper printed in the state, and nearest the place where the attachment issued, within thirty days from the time the writ is returned, and for six weeks successively. Neglect to have the notice so published, will be visited with a dismissal of the suit, and costs.^p

The clerk of the court is required, by law, to make out the advertisement, and deliver it, on demand, to the plaintiff or his attorney.^p

The advertisement may be in the form following:

Form of Notice for Publication.

ATTACHMENT.

On the — day of —, A. D. —, A. B. caused to be issued from the Court of Common Pleas of — county, Ohio, a writ of attachment, for the sum of [*here insert the amount claimed in the writ,*] against the property and effects of C. D.; which writ has been served and returned.

Attest,

[Date.]

T. C., Clerk — Com. Pleas.

S. S., Attorney for Plaintiff.

➤ To Printer: *Publish six weeks successively.*

At the appearance term the defendant in attachment must be called, and his default entered;^q and a journal entry thereof made in the form following:

Journal Entry at the Appearance Term.

A. B. }
v. } In Attachment. 1st. Default.
C. D. }

This day came the plaintiff by his attorney, and the defendant being three times called to come into court, &c., came not, but made default; [and this cause is continued.]

If a garnishee has been notified to attend, his examination under oath, must be reduced to writing, and should be entered on the journal before the suit in attachment is continued.

The examination of the garnishee may be reduced to writing and entered on the journal in the form following:

Form of Journal Entry relating to Garnishee.

A. B. }
v. } In Attachment.
C. D. }

This day came G. G., garnishee herein, and in open court, after being duly

(p) Swan's Stat. 89, sec. 3.

(q) Ib. 91, sec. 9.

Proceedings at the first and second Term.

sworn, was questioned, and answered, touching the property and credits of the defendant, in his possession, as follows :

Question by Plaintiff.

Answer of G. G.

No further proceedings are had in relation to the garnishee, until the suit in attachment is determined.*

Animals and property of a perishable nature, may be sold by order of the court, at any time after the return of the writ. The order in such case may be in the form following :

A. B. }
 v. } In Attachment.
 C. D. }

On motion of the plaintiff, and it appearing to the satisfaction of the court, that the following property, attached by the sheriff, under the writ of attachment issued in this case, is of a perishable nature, to wit : [*here describe the property as in the inventory,*] it is ordered by the court, that said property, together with the animals attached, be sold by the sheriff, in like manner as if levied upon by execution.

SEC. VIII. PROCEEDINGS AT THE SECOND TERM.

Proof of the publication of the notice of the issuing of the writ, should be filed, and the second default entered.* Annex to a copy of the advertisement the following affidavit :

Form of Affidavit of publication of the Notice of issuing the Attachment.

The State of Ohio, — County, ss.

In open court, personally appeared, P. P., who made oath that a notice, a copy of which is hereto attached, was published on the [*the day of the first publication,*] A. D. —, and for six weeks successively thereafter, in the —, a newspaper printed at —, in the county of —, in the State of Ohio, and nearest the place where the attachment, mentioned in said notice, issued.

{ COPY OF }
 { NOTICE. }

[SIGNED.]

Sworn to and subscribed, in open court this, [&c.] }
 C. C., Clerk. }

(r) Id. 92, sec. 10.

(s) See the form in the preceding section.

Proceedings at the third Term.

Form of Journal Entry at the second Term.

A. B. }
 v. } In Attachment.
 C. D. }

This day came the plaintiff and made proof to the satisfaction of the court, of the due publication of the notice required by law, of the issuing of the attachment herein, &c., and in the manner, and within and during the time prescribed by law. And thereupon, the defendant being three times called to come into court, &c., came not, but made default; and this cause is continued.

SEC. IX. PROCEEDINGS AT THE THIRD TERM.

The statute directs that the defendant shall be again called at the third term and his default entered; and, at or before which third term, the plaintiff, and every other creditor of the defendant, may file their declarations, setting forth, in a proper manner, their cause of action: and it shall be competent for the defendant, at or before the third term, to file special bail, or surrender himself in custody, or elect to have the property attached remain in custody, and may plead to all or any of the declarations, which may be filed against him.¹ If the defendant does not plead, the court at the third term, will proceed, at the suit of all the plaintiffs, as in other cases of default; and the defendant, or any other person on his behalf, may resist the claims of any of the creditors, and introduce evidence before the court and jury, as in other cases of default; and have the like right to move in arrest of judgment, except to the opinion of the court, or to move to set aside the proceedings for irregularity.¹

If the defendant enters special bail, or surrenders himself into custody, the property and credits attached are thereby discharged, and the court will order the officer to deliver the same to the defendant.¹

If the defendant neither files special bail nor surrenders himself into custody, he may, notwithstanding, plead to, and defend the suits brought against him.¹

The declaration of the plaintiff in attachment may be in the usual form.— It may be proper for other creditors who file declarations against the defendant, to commence them in the form following:

Form of commencement of Declaration against the Defendant.

——— Com. Pleas. Of the term of ———, A. D. ———, [*the third term.*]
 The State of Ohio, ——— County, ss.

A. A., one of the creditors of C. D., against whose property, credits, &c., an attachment hath been issued, at the suit of A. B., now comes by J. S., his attorney, and complains, [*&c., proceeding as in the usual form.*]

(1) Swan's Stat. 91, sec. 9,

Proceedings at the third Term.

The common commencement, however, would, probably, be sufficient, as the journal entries would show that the creditors are proceeding by virtue of the attachment.

The form of entering the special bail can be readily made out from the forms heretofore given.*

The judgments are entered in the usual form, except that the heading of the entry of judgments in favor of creditors, should show that the judgments are taken by virtue of the original proceedings in attachment, thus:

Form of the heading of the Journal Entry of Judgments.

A. A. [the name of the creditor.] v. C. D.	}	In Attachment, issued at the suit of A. B. [the name of the original plaintiff in attachment,] against C. D.
---	---	---

This day came the said A. A., [&c., proceeding as in the usual form.

An order should also be taken, for the sale of the property attached;† which may form a part of the entry of the judgment in favor of the original plaintiff in attachment.

Form of order for the sale of property attached.

After entering the judgment in favor of the plaintiff in attachment, proceed thus:— And on motion of the plaintiff, the court do order, that all the property of the defendant, attached by virtue of the writ of attachment issued herein, and remaining in the hands of the sheriff, with the lands and tenements attached, whether held by legal or equitable title, be sold. And for the purpose of distributing the proceeds of said sale, &c., among the several creditors of said C. D., this cause is continued.

If judgment is rendered against the original plaintiff in attachment, or if he otherwise fails to prosecute his suit to effect, the proceedings in favor of other creditors, who may have filed declarations, will not be affected thereby.‡ The property attached will remain in the hands of the officer for their benefit;§ so that, in fact, after proceedings are commenced and property attached, the plaintiff in attachment has no control over the case.¶

SEC. X. HOW PROPERTY IN THE HANDS OF THE OFFICER DISPOSED OF, AND THE PROCEEDS APPLIED, WITH FORMS.

An order being taken for the sale of the property attached, the same is sold, under the same restrictions and regulations, as if levied upon by execution.‡

(u) See ante, 169.

(v) Swan's Stat. 92, sec. 11.

(w) Id. 91, 92, sec. 9; 7 Ohio Rep. (part 2,)

133.

(x) Id. 92, sec. 11.

Execution — Sale — Distribution.

Upon præcipe filed for that purpose, by the plaintiff in attachment, or if he has not prosecuted his claim to judgment, then by the creditor in whose favor the order for the sale is made, the clerk will issue an order in the nature of a venditioni exponas. This writ may be in the form following :

Form of Execution for the Sale of Property Attached.

The State of Ohio, ——— County, ss.

To the Sheriff of said county, Greeting :

Whereas our Court of Common Pleas of said county, at their ——— term A. D. ———, ordered all the property of C. D. which you lately, according to our command, attached, by virtue of a writ of attachment, issued at the suit of A. B. against the said C. D., remaining in your hands, with the lands and tenements, whether held by legal or equitable title, to be sold by you :

We therefore command you to expose to sale said property, lands and tenements, and have the money, arising from said sale, before our said Court, on the first day of their next term ; and have you then there this writ. Witness, [*&c.*]

Whether the officer should have the real estate appraised or not, under the execution, does not clearly appear from the statute, which provides that the property “shall be sold by order of the court, under the same restrictions and regulations as if the same had been levied upon by execution.” It is likely that no new appraisalment would be necessary, but that the appraisalment made by the freeholders at the time the property was attached, would be the only appraisalment required.

The money, arising from the sale, with the amount which may be recovered from the garnishee, after discharging the costs, is divided among the several creditors, in proportion to the amount of their respective judgments.*

The per centage can be struck by the clerk, or a reference had to a Master, for that purpose. Upon ascertaining the per centage, an order may be taken, in the form following :

Form of Order for Distribution of Proceeds of the Property Attached, &c. among the Judgment Creditors.

A. B. }
v. } In Attachment.
C. D. }

The Court do find the amount of money arising from the sale of the property attached herein [and the amount received from the garnishee,] to be ——— dollars ——— cents, the amount of the costs upon the judgments, rendered herein, and in favor of the other judgment creditors, of said C. D., with the

(y) Id. 92, sec. 11.

(z) 92, 93, sec. 11.

 Proceedings against Garnishee.

accruing costs, to be — dollars — cents, leaving the sum of — dollars — cents to be divided amongst the several judgment creditors of the said C. D., and that the same entitles each judgment creditor to be paid — cents on each dollar of their respective judgments, exclusive of said costs, and the same is ordered to be paid accordingly.

If there be not sufficient to satisfy the whole, execution may issue for the residue as in other cases.

SEC. XI. PROCEEDINGS AGAINST THE GARNISHEE, AFTER JUDGMENT IN THE ORIGINAL ACTION, WITH FORMS.

The statute provides for a *capias ad respondendum* being issued against a garnishee, before judgment in the original suit in attachment, upon the affidavit of the plaintiff, or other credible person being filed, setting forth that the affiant has good reason to, and does verily believe that the garnishee will abscond, before judgment and execution can be had against him, &c.^a If these provisions of the statute are repealed by the non-imprisonment act, proceedings against garnishees must be had in the mode pointed out in the sixth section of this chapter.

After judgment in the original suit in attachment, a *scire facias* may be issued against the garnishee, whose examination has been entered upon the minutes of the court, to appear at the next term and show cause why the plaintiff should not have execution of the money due by him to the defendant, or of the goods and chattels of the defendant, in the possession of the garnishee.

The *scire facias* may be in the form following :

Form of Scire Facias against the Garnishee.

The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting :

Whereas A. B., on the — day of —, A. D. —, in our Court of Common Pleas, within and for the said county of —, recovered a judgment, in a suit in attachment, against C. D., and in which said suit, one G. G. was served with process and notice, as garnishee therein, and was duly examined in the premises touching the property and credits of the said C. D. in his possession, or within his knowledge, as appears of record : Therefore you are commanded to make known to the said G. G., to appear on the first day of the next term of our said court, and show cause, if any he has, why the said A. B. should not have execution [as well] of the money due by him, the said G. G. to the

(a) Id. 89, 90, sec. 5.

Proceedings against Garnishee.

said C. D., as also of the goods and chattels of the said C. D., in the possession of him, the said G. G.; and have you then there this writ.

Witness, [&c.]

This writ should be personally served upon the garnishee, or if he cannot be found, returned, "nihil." If two writs are returned "nihil," the plaintiff may proceed in like manner as if the writ were personally served.^b

If the garnishee appears, upon the return of the scire facias, and upon oath or otherwise, to the satisfaction of the plaintiff, confesses the amount of the debt which he may owe the defendant in attachment, or the value of the goods and chattels of the defendant in his possession, and delivers the same to the officer, or shall pay the value thereof, and all moneys from him owing to the defendant, into court, the garnishee will be discharged from all further liability on account of the goods so delivered, or the money so paid; and the costs thereof, must be paid out of the effects attached.^c

In such case, the journal entry may be in the form following:

Form of Journal Entry where the Garnishee settles with the Plaintiff in Attachment.

A. B., Plaintiff in Attachment, against C. D. v. G. G., a Garnishee therein.	}	Upon Scire Facias, in Attachment.
---	---	--------------------------------------

This day came the said A. B. and G. G., and the said G. G. having confessed the value of the goods and chattels of the said C. D. in his hands, to the satisfaction of said A. B., [and delivered the same to the sheriff who served said writ of attachment, or *if the value of the goods is paid by the garnishee, say, and hath paid the value thereof, being — dollars — cents, into court: add, if there be a debt due from the garnishee to the plaintiff in attachment,* and the said G. G. having confessed the amount of the debt due from him to the said C. D., being — dollars — cents, and paid the same into court,] it is therefore considered by the court, that the said G. G. be discharged from all further liability to the said A. B., &c., on account of said goods so delivered, and said moneys so paid; and the costs herein taxed at — dollars — cents, are ordered to be paid out of the effects attached.

If however the garnishee, after being served with the scire facias, or on two writs returned "nihil," does not appear and confess, as above mentioned, the plaintiff in attachment may take judgment against him, by default; and the court will proceed to assess the amount of the judgment, and issue execution therefor, as in other cases.^d

The journal entry, and judgment by default, may be in the form following:

(b) Id. 92, sec. 10.

(c) Id. 92, sec. 10.

(d) Id. 92, sec. 10.

 Proceedings against Garnishee.

Form of Rule against Garnishee.

A. B. (plaintiff in attachment against C. D.)	}	Upon Scire Facias, in Attachment.
v.		
G. G. (a garnishee therein.)		

On motion of the said A. B., it is ordered that said G. G. appear by to-morrow morning, at 10 o'clock, and plead, or show cause against judgment being entered herein against him.

Form of Judgment, by Default, against a Garnishee.

Entitle the entry as in the preceding form.] This day came the said A. B., and the said G. G. having failed to appear, plead or shew cause, as ruled to do, and being three times called to come into court, &c., came not, but made default: whereupon it is considered, that the said A. B. ought to recover his damages by reason of the premises. And neither party requiring a jury, and the court being fully advised in the premises, do find that the value of* the goods and chattels of the said C. D., in the possession of the said G. G. at the time the writ of attachment issued against C. D. was served on the said G. G., as garnishee, and liable to be attached by said writ, was — dollars — cents; and that there was also then due by him, the said G. G. to the said C. D., the sum of — dollars — cents, upon which interest is now due to the amount of — dollars — cents; amounting, in the whole, to — dollars — cents; and the court do assess the damages herein, by reason of the premises, to said last mentioned —: Therefore it is considered by the court, that said A. B. recover of the said G. G., the said sum of — dollars — cents, and his costs herein taxed at — dollars — cents.

If the garnishee appears, no declaration is filed against him, but he pleads to the scire facias.* Unless cause be shown, the plea should be filed at the return term of the writ of scire facias. The pleadings are made up and the issue tried as in other cases. What would be a good defence against the suit of the absconding debtor, for the goods or debt claimed to be due from the garnishee, may be set up by the garnishee against the attaching creditor.'

The verdict and judgment against a garnishee, where an issue is made up, may be in the form following:

Form of Verdict and Judgment against a Garnishee upon an Issue.

A. B. (plaintiff in, &c.)	}	Upon Scire Facias, in Attachment.
v.		
G. G. (a garnishee therein.)		

This day came the said A. B. and G. G., [and thereupon came a jury, to wit, E. E., [&c.], who being empanelled and sworn the truth to speak upor

(e) Id. 92, sec. 10.

(f) Wright's Rep. 724.

Issuing to another County — Justice's Attachment superseded.

the issue joined between the parties, upon their oaths do say, *or if the cause be submitted to the court instead of a jury, say:* and waiving a jury, by consent, submit this cause to the court for trial, &c., upon the issue joined between the parties; and thereupon the court, having heard the evidence, do find] that [*here state the finding of the court or jury in the language of the issue made by the parties,*] and that the value of—[*Proceed as in the form of a judgment by default against a garnishee, ante p. 1205, from the asterisk to the end of that form.*]

SEC. XII. WHEN AN ATTACHMENT MAY ISSUE TO ANOTHER COUNTY, AND THE PROCEEDINGS THEREON.

If the plaintiff, or his agent or attorney, will make and file with the clerk, an affidavit, setting forth that he verily believes that the defendant in attachment, hath lands, tenements, and real estate, goods or chattels, situate in any other county (naming such county) in the state, the clerk, on application of the plaintiff, or his attorney, will make out another writ of attachment, directed to the sheriff or coroner of the county in which such other property may be, who serves and returns the same, in the same manner, and for neglect is liable to the same penalty, as if such writ were issued and returnable in his own county. The same proceedings are had on this writ, as have been herein before mentioned, in regard to the proceedings upon the original writ.^a

SEC. XIII. THE EFFECT OF THE DEATH OF THE DEFENDANT.

We have already seen that his death, after the writ of attachment has been issued, will not abate it; but the same may be carried on to judgment, sale and distribution, as if such death had not happened.^b

SEC. XIV. THE EFFECT OF AN ATTACHMENT HAVING BEEN PREVIOUSLY ISSUED BY A JUSTICE OF THE PEACE.

The writ, issued from the Court of Common Pleas, supersedes all attachments issued by a justice of the peace, which may be undetermined at the time of serving the first mentioned writ. The sheriff may take all property taken by the constable, as if no writ had been issued by the justice; but the plaintiff in such attachment, pending before a justice, and such other creditors as may have filed their claims before the justice, may proceed thereon to final judgment before the justice; and a transcript of the judgments must be filed in the Court of Common Pleas, and the parties thereto (plaintiffs) will be entitled to the same distribution, as if such judgments had been obtained in court; and all costs accruing before the justice, will be taxed with the costs of court, and paid as herein before mentioned.^c

(g) Swan's Stat. 93, §12.

(h) Id. 93, §14; 17 Ohio Rep. 409.

(i) Swan's Stat. 93, §15

CHAPTER XLII.

PROCEEDINGS AGAINST WATERCRAFT.

- SECTION I. NATURE OF THE PROCEEDING, AND IN WHAT CASES ALLOWED, &C.
- II. THE MODE OF PROCEEDING ; THE PRÆCIPUE, AFFIDAVIT, AND BILL OF PARTICULARS.
- III. THE ISSUING AND FORM OF THE WARRANT.
- IV. PROCEEDINGS UNDER THE WARRANT, WITH FORMS.
- V. PROCEEDINGS IN THE CAUSE, AFTER THE RETURN OF THE WARRANT.

SEC. I. NATURE OF THE PROCEEDING, AND IN WHAT CASES ALLOWED, &C.

The statute provides,* that steam boats, and other watercrafts, navigating the waters within, or bordering upon this state, shall be liable for debts, contracted on account thereof, by the master, owner, steward, consignee, or other agent, for materials, supplies or labor, in the building, repairing, furnishing or equipping the same, or due for wharfage ; and also for damages, arising out of any contract for the transportation of goods or persons, or for injuries done to persons or property, by such craft ; or for any damage or injury done by the captain, mate, or other officer thereof, or by any person under the order or sanction of either of them, to any person who may be a passenger or hand, on such steamboat, or other watercraft, at the time of the infliction of such damage or injury. For these claims, suit may be brought against the craft itself.*

By an amendatory act of February 24th, 1848,^b the provisions of this statute were extended to causes of action, which may have accrued beyond, or out of the territorial limits or jurisdiction of the State of Ohio, although the craft might not have been, at the time the cause of action accrued, navigating the waters within, or bordering upon the state ; provided, that no claim or cause of action, accruing beyond, or out of the territorial limits or jurisdiction of the state, should be permitted to attach or operate, to the prejudice of any bona fide purchaser of the craft, not having notice of the existence of such claim or cause of action.*

(a) Swan's Stat. 206, § 1.

(b) 46 vol. Stat. 78, § 1.

(c) The second section of this act declared, that the act should be held to apply, as well to

cases already pending, as to such as might thereafter be brought ; but the Court in Bank decided, that this provision was unconstitutional and void : 17 Ohio Rep. 125 ; the court having, be-

In what cases.

The statute extends to seamen's wages,^d and debts contracted for provisions, and all other necessary articles, furnished for the use of the boat, its passengers and crew ;^e and to cases of assault and battery committed by an officer or one of the crew.^f

Sub-contractors and day laborers, employed to perform work on watercraft, may assert their claim against the craft, no matter in whose hands the craft may be afterwards found.^g Nor, is it material at whose instance the work was done, provided the person who employed the laborers, had, at the time, the control of the craft, or some part of her, as contractor or sub-contractor, for the building thereof.^h

The mortgage of the craft, does not withdraw it from the operation of the statute ; and, in the distribution of the fund arising from the judicial sale of the craft, the mortgage will be postponed to the judgment creditors under the statute.ⁱ

The person who charters a vessel for a trip, does not become the owner of the boat, when, by the terms of the charter-party, he pays a gross sum, the general owner furnishing the master and crew, and defraying the expenses of the vessel. In such case, a contract of the master to carry goods and collect the price of the goods from the consignee, inserted in the bill of lading, is binding on the vessel, and may be enforced, under the statute, against the vessel.

Where a person has engaged to build and deliver a boat at a future day, at a specific price, to be paid after the delivery, and has delivered the boat, in pursuance of such agreement, he cannot afterwards proceed against it, in the possession of a third person, to recover for "materials, supplies, and labor," expended in building the same ;^j inasmuch as the claim of the builder, is simply a claim for the price due upon the sale and delivery of the boat, and the materials being furnished for, and the labor in building being done by him, for himself, the case does not come within the letter or spirit of the statute.— Besides, the builder, in such case, was the owner of the boat, and must be treated as such, until he delivered it ; and it is clear, that, if the owner of a boat build it for the market generally, and afterwards find a purchaser, he cannot seize it, under the statute.^k

If a creditor procures an assignment of the craft to be made by the owner to a trustee, in satisfaction of the debt, he cannot afterwards proceed under the statute against the craft.^l

The statute does not include debts contracted before its passage.^m

fore this law was passed, held that the act of Feb'y 26, 1840, only applied to cases arising within the state, or to boats navigating waters within, or bordering upon the state, when the cause of action arose. 16 Ohio Rep. 91, 178.

(d) 12 Ohio Rep. 341.

(e) 11 Ohio Rep. 458 ; 16 Ohio Rep. 178.

(f) 16 Ohio Rep. 91 ; 11 Ohio Rep. 387, per Hitchcock, J.

(g) 18 Ohio Rep. 187 ; 14 Ohio Rep. 23, 413 ; 15 Ohio Rep. 589, 590 ; per Birchard, J. : 16 O. R. 278, per Avery, J.

(h) 17 Ohio Rep. 359 ; 14 Ohio Rep. 72.

(i) 17 Ohio Rep. 460.

(j) 15 Ohio Rep. 585 ; 16 Ohio Rep. 276.

(k) 16 Ohio Rep. 276.

(l) 14 Ohio Rep. 72, 88.

(m) 10 Ohio Rep. 384.

The Præcipe, Affidavit, and Bill of Particulars.

The statute does not create a lien on the craft ; but merely declares a liability, and the mode of enforcing it.^a The lien is created from the time of seizure. The vigilant creditor, therefore, obtains the same advantage, by priority of seizure, that a vigilant judgment creditor secures to himself by making the first levy on personal property under an execution. The lien first attaching, by virtue of the seizure, will be first satisfied, and so on, in the order of priority.^a The consequence is, that if the craft is seized, condemned and sold, and the overplus paid over to the owner, before a prior creditor is informed of the proceeding, the latter cannot afterwards proceed against the craft ;^a for the purchaser, at the sale of the craft, under the statute, takes her, divested of claims existing against her, by virtue of the statute, at the time of the seizure.^a

SEC. II. THE MODE OF PROCEEDING ; THE PRÆCIPE, AFFIDAVIT, AND BILL OF PARTICULARS, WITH FORMS.

The first step to be taken, to charge the craft, is, to file a præcipe, in the clerk's office, for a warrant, naming therein the craft, if she have a name, and if not, giving a substantial description of the same. With the præcipe, must be also filed a bill of particulars of the demand, verified by the affidavit of the plaintiff, or his agent or attorney, or other credible person.^c

The plaintiff will not be confined, in his final recovery, to the amount sworn to, if he lays his general damages, in the writ and declaration, to a larger amount.^d

In stating the cause of action in the affidavit, the draftsman may be aided by the forms, already given, for stating the cause of action in affidavits to hold to bail.^e

The affidavit or bill of particulars should show, that the claim comes within the description of those for which water craft are liable under the statute.

Forms of Præcipe, Bill of Particulars and Affidavit, relating to Transportation.

A. B.	}	
v.		
The Canal Boat [Joy,] a water craft, navigating the waters within the State of Ohio.		Assumpsit. Damages, \$ [500.]

Issue a warrant of seizure, returnable [forthwith or to next term,] against the canal boat [Joy,] a water craft navigating the waters within the state of Ohio. Indorse : "Suit brought to recover damages, sustained for non performance by the defendant, of a contract made by the defendant with the plaintiff,

(n) 14 Ohio Rep. 408.

(o) Swan's Stat. 209, sec. 3.

(p) 18 Ohio Rep.

(q) See ante p 133 to 135.

The Præcipe, Affidavit, and Bill of Particulars.

to transport 1000 barrels of flour from C. to D. Precise sum due and sworn to, as aforesaid, \$450, with interest from — to the time of payment."

W. W., Attorney for Plaintiff.

To Clerk — Com. Pleas.

Bill of Particulars.

(A.)

The canal Boat [Joy]

To A. B.,

Dr.

1860. January 28. To damages sustained for non-performance of contract to transport 1000 barrels of flour, from C. to M., due — 18 —, \$450 00

The State of Ohio, — County, ss.

A. B., the plaintiff above named, of lawful age, being duly sworn, deposeseth and saith, that the above named canal boat [Joy,] is a watercraft navigating the waters within the state of Ohio; and that the above bill of particulars marked "A.," is a just and true account of damages, arising out of the non-performance of a certain contract made by said boat through the master thereof, with this affiant, to transport from C. to D. 1000 barrels of flour for this affiant, and that said damages are justly due to, and have been sustained by affiant, to the amount of four hundred and fifty dollars, with interest from — to the time of payment.

[Signed] A. B.

Sworn to and subscribed before me this —.

G. H., Justice of the Peace.

The like for Materials and Work in Building, Repairing, &c., and Supplies furnished; and for Wages, as Master, &c.

A. B.

v.

The Schooner [Just,] a water craft navigating the waters bordering upon the State of Ohio.	}	— Com. Pleas. In Assumpsit. Damages \$ [1000.]
--	---	--

Issue a warrant of seizure, returnable [forthwith, or say, to the next term,] against the schooner [Just,] a water craft navigating the waters bordering upon the state of Ohio.

Indorse: "Suit brought against the schooner [Just,] for [Here state the cause of action as thus:] work and labor, care and diligence, and materials found for said defendant, in the building, equipping [and repairing] of her, and at her request. Also for goods and chattels sold and delivered by plaintiff to defendant, the same being supplies and provisions furnished said defendant at her request. Also for the wages of the plaintiff and for his services, work and labor, done and performed by him as [mariner or master of and, or as the case may be,] on and for said defendant and on her retainer.

The Precipe, Affidavit, and Bill of Particulars.

Precise sum claimed to be due, and sworn to, as aforesaid, \$ [409,] and interest on same from *October 1, 1850*, to the time of payment."

To Clerk — Com. Pleas.

S. T., Attorney for Plaintiff.

[*Date.*]

Bill of Particulars.

(A)

The Schooner [*Just,*

To A. B.,

Dr.

1849.	Nov. 17.	To 110 days work in building said schooner, at \$3 per day-----	\$330 00
1850.	April 1.	To 10 days work, repairing said schooner, at \$3 per day -----	30 00
"	" "	To iron, \$5; and anchor, \$20, furnished said schooner-----	25 00
"	" "	To bread, beef, ham, pork and potatoes, [<i>insert items as in an account, with prices and dates, if it can be done,</i>] furnished said schooner on her first trip-----	10 56
"	" "	To sailing said schooner as her master, from April 1, to Oct. 1, 1850, at \$50 per month,-----	250 00
"	" "	[To wages as mariner on board said schooner [from — to —], for — months, be- ginning on, [&c.,] and ending on, [&c.,] at \$— per month]-----	
			<hr/> \$645 56
By cash and goods at sundry times-----			236 56
Balance, Oct. 1, 1850-----			<hr/> \$409 00

The State of Ohio, — county, ss.

A. B., the plaintiff above named, of lawful age, being duly sworn, deposeseth and saith, that the above named schooner [*Just,*] is a watercraft, navigating the waters bordering upon the State of Ohio; and that the within bill of particulars, marked (A), is a just and true account of money due this affiant from said schooner [*Just,*] for work and labor done by him on her, and for materials furnished by him to her, in building [and equipping and repairing] said schooner; and for provisions and supplies furnished her by this affiant; and for the wages of this affiant, and for his services, work and labor, done and performed by him, as [mariner or master of and] on and for said schooner, and in navigating her; and that the same is still justly due this affiant, to the amount of [four hundred and nine] dollars, and interest thereon, from the [first] day of [October,] A. D. 1850.

[Signed]

A. B.

Sworn to and subscribed before me, this [&c.]

The Præcipe, Affidavit, and Bill of Particulars.

The like, for Collision of two Steamboats.

A. B.
v.
The Steamboat [Clipper,] a steam-boat navigating the waters bordering upon the State of Ohio. } — Common Pleas. Trespass. Damages \$5,000.

Issue a warrant, returnable to next term, against the steamboat [Clipper,] a steamboat navigating the waters bordering upon the State of Ohio. Indorse: "Suit brought for defendant wrongfully running into, and greatly damaging, the steamboat [Mail,] on the — day of —, A. D. —, on the Ohio river, near —, owned by plaintiff. Precise amount sworn to, and claimed to be due, \$2,000."

F. & L., Atty's for Plaintiff.

To Clerk — Com. Pleas.

[Date.]

(A)

Steamboat [CLIPPER,]

To A. B.,

Dr.

18—. January —. To damage done the hull, engines and machinery, cabin and other parts of the steamboat [Mail,] by running into her on the — day of —, A. D. —, \$2,000 00

The State of Ohio, — county, ss.

A. B., the plaintiff above named, of lawful age, being duly sworn, deposeseth and saith, that on the — day of — last, he was the owner of the steamboat [Mail,] that while the said boat was safely and prudently being navigated on the Ohio river, near —, the above named steamboat [Clipper] carelessly, wrongfully, and illegally, ran into the said steamboat [Mail,] and thereby greatly damaged her, the said [Mail,] to the amount of [two thousand] dollars, and that the annexed bill marked (A), is a true bill of particulars of his demand against the said steamboat [Clipper,] in the premises.

A. B.

Sworn to and subscribed before me, this — day of —, A. D. —.

G. H., Justice of the Peace.

SEC. III. THE ISSUING AND FORM OF THE WARRANT.

The clerk, on receiving the præcipe, with the bill of particulars verified by affidavit, issues a warrant, returnable as other writs, directing the seizure of the craft, (by name, or by description,) or such part of her apparel or furni-

Issuing, Form, and Service of the Warrant.

ture as may be necessary to satisfy the demand, and to detain the same until discharged by due course of law.'

The warrant may be in the form following :

Form of the Warrant.

The State of Ohio, — county, ss.

[SEAL.] To the Sheriff of said county—Greeting :

We command you to seize the [steamboat Clipper,] a [steamboat or watercraft] navigating the waters [bordering upon, or say, within] the State of Ohio, or such of her apparel or furniture as may be necessary to satisfy the demand herein of A. B.; and the said [steamboat,] or such part of the apparel or furniture aforesaid, safely keep and detain, until discharged by due course of law, to answer to the said A. B. in a plea of — : Damages — dollars ; before the Court of Common Pleas of said county, [on the first day of their next term ;] and have then there this writ.

Witness, C. C., clerk, [&c.]

Indorse the warrant as directed by the præcipe.

SEC. IV. PROCEEDINGS UNDER THE WARRANT WITH FORMS.

The officer need not seize the craft, her apparel, or furniture, until the plaintiff or some one on his behalf, advances such sum of money as the officer thinks reasonable and necessary, to defray all necessary expenses in taking charge of, detaining and securing the craft, apparel, or furniture.'

The officer seizes the craft, or such part of her apparel or furniture as may be necessary to satisfy the demand.'

He must detain the craft, or the apparel, or furniture seized, until final judgment, unless discharged by bond.

If necessary, he may employ a person to take charge of the craft ; but he cannot pay therefor, more than two dollars per day.^a The owner, master, steward, consignee, or other agent of the craft, may discharge the property seized, upon entering into bond to the officer, with two good and sufficient sureties, within the county where the craft may have been seized, in double the amount of the demand sworn to be due by the plaintiff, his agent, or attorney, conditioned that the property, or double the amount sworn to be due, shall be forthcoming, to answer the judgment under the seizure.'

The bond, in such case, may be in the form following :

(r) Swan's Stat. 210, sec. 4.

(s) 41 vol. Stat. 52.

(t) Swan's Stat. 210, sec. 4.

(u) 41 vol. Stat. 52.

(v) Swan's Stat. 210. sec. 5.

Proceedings under the Warrant and Return.

Form of Redelivery Bond.

Know all men by these presents, that we, C. D., E. F., G. H. and I. J., of the county of —, Ohio, are held and bound, unto S. S., sheriff of said county, in the penal sum of — [double the amount sworn to] dollars; for the payment of which, we hereby jointly and severally bind ourselves.

Sealed with our seals, this — day of — A. D. —.

Whereas, by virtue of a certain warrant in [the name of the action,] issued out of the Court of Common Pleas of said county, wherein A. B. is plaintiff and the [steamboat —, a steamboat or watercraft,] navigating the waters [bordering upon, or say, within] this state, is defendant, and returnable to — term of said court, A. D. —, and numbered —, the said sheriff has seized upon the said boat, her [engine] apparel and furniture, to satisfy the demand of said warrant, which is [the amount sworn to;] and at the request of the above named obligors, has left said boat and other property in the possession of —, the [master] of said boat.

Now if the said boat, her apparel and furniture as specified in the seizure and levy made on said warrant, or said sum of [here insert double the amount sworn to,] dollars, shall be forthcoming to answer the judgment under said seizure, then this obligation to be void, otherwise in full force.

[Signed,]

[SEALS.]

Attest: X. X.

The officer must return with the writ, an account of the expenses incurred in the discharge of his duties. If the amount paid into his hands, prior to the execution of the writ, exceeds the sum expended, he must pay over the balance to the plaintiff, or his attorney; but if it be less, then the plaintiff, his agent, or attorney, must forthwith pay the balance of the expenses to the officer.*

The officer must also return with the warrant an inventory of the effects seized and held under it.*

January 28, 1860. I have seized upon the boat within named, her apparel and furniture, as per inventory hereto annexed, marked (A,) [and returned the same to L. L., the master of said boat, he having entered into bond with security according to law, as per copy of bond, hereunto annexed.]

S. S., Sheriff.

Fees: Service and mileage, -----	\$1 05
Bond, -----	50
Keeping, &c., -----	1 00
	<hr/>
	2 55

Proceedings in Court after the return of the Warrant.

(A)

Inventory of the property seized under the warrant hereto annexed and referred to in the return thereto :

The said boat CLIPPER,
3 Sofas, [&c.]

S. S., Sheriff.

SEC. V. PROCEEDINGS IN THE CAUSE AFTER THE RETURN OF THE WARRANT.

If nothing is seized under the warrant, of course no further proceedings can be had.

But if any property is seized, the cause is conducted, and the pleadings made up, and judgment rendered, as in other cases.'

The declaration avers a promise, breach, or injury, precisely as if the boat were a person.

The declaration usually commences as follows :

Form of the commencement of the Declaration.

—— Com. Pleas. Of the term of ——, A. D. ——.

The State of Ohio, —— County, ss.

A. B., by F. and L., his attorneys, complains of the [steamboat] ——, a [steamboat, or watercraft,] navigating the waters, [bordering upon, or within] the State of Ohio, [which, or say, the apparel and furniture of which,] was seized by warrant, to answer unto the plaintiff in a plea of —— . For that, [&c., proceeding as in the usual form, and as if the boat were a person.

The only provision in the statute which renders the pleadings different from a common civil action, is this: if the suit is commenced, "without reasonable or proper cause, the person or persons commencing the suit shall be liable to make compensation to the defendant or defendants, for all damage by him, her or them sustained, by reason of the commencing of such suit or action : the defendant or defendants, if appearing or defending, and damaged as aforesaid, shall set forth by plea, or notice attached to the general issue, that the suit was commenced without reasonable or probable cause, to the damage of the defendant or defendants ; and if the jury, on the trial, shall find that the suit was commenced without reasonable or probable cause, they shall assess the damages, sustained by the defendant or defendants, by reason of the commencing of such action as aforesaid, and for the amount so assessed, judgment shall be rendered and execution issued, according to the usual rules of proceeding."

(y) Swan's Stat. 210. sec. 6.

(z) Id. 210, sec. 8. The draftsman of this statute after putting into the second section the important provision, that the craft might be sued

by name, evidently in drafting all the other sections, forgot that the craft might be the defendant.

Verdict, Judgment and Execution.

The verdict and judgment is in the usual form, as if the boat were a person.

If the judgment is against the plaintiff, the property will be restored. If for the plaintiff, and the property is in the hands of the officer, it may be sold upon execution to satisfy the judgment. The execution can be readily made out from the form of a vendi. The sale will be conducted like other sales on execution. If the proceeds of the sale exceed the judgment and costs, the overplus, if any, is of course paid to the owner of the boat, his agent, or attorney. The mode of distribution has been already stated^a when there are two or more judgments.

The provision of the statute which authorizes the collection of any balance which may be due on the judgment by execution, after crediting the proceeds of the sale, seems to be a nullity.^b

(a) Ante, p. 1209.

(b) 10 Ohio Rep. 389

CHAPTER XLIII.

ARBITRATION.

- SECTION I. THE REQUISITES AND FORM OF AN ARBITRATION BOND, TO MAKE THE SUBMISSION A RULE OF COURT.**
- II. HOW THE AWARD MADE OUT AND PUBLISHED, IN SUCH CASE.**
- III. PROCEEDINGS TO ENFORCE THE AWARD BY JUDGMENT, OR ATTACHMENT.**
- IV. FORMS RELATING TO AWARDS, WHICH ARE MADE A RULE OF COURT.**
1. Form of award.
 2. Form of affidavit of the execution of the arbitration bond, &c.
 3. Notice of filing the award.
 4. Form of Judgment on award of money.
 5. Form of orders, &c. to enforce the performance of an act, other than the payment of money.
- V. REFERENCE OF A SUIT PENDING TO ARBITRATION.**
1. Form of order of reference, waiving all exceptions.
 2. Award on the above.
 3. Form of order of reference in the common form.
 4. Award on the above.
 5. Judgment, &c.

The law relating to arbitrations and awards, does not come within the scope of a work upon the practice of our courts, except so far as awards may be enforced therein by rule, or causes pending may be referred thereout, by the consent of parties; and this chapter will, therefore, be confined to those two subjects.

SEC. I. THE REQUISITES AND FORM OF AN ARBITRATION BOND, TO MAKE THE SUBMISSION A RULE OF COURT.

The statute^a seems to require an arbitration bond, when the submission is to be made a rule of court and enforced by judgment or attachment, to set forth

(a) Swan's Stat. 67, sec. 2, 3.

Form of Arbitration Bond.

the name or names of the abitrators or umpire ; the matter or matters submitted ; a certain time and place for the meeting of the arbitrators ; a stipulation, that the arbitrators or umpire, shall have the right to adjourn, from time to time, until an award or umpirage be made ; a certain time specified, at which the award or umpirage be made up ; and a stipulation, that the submission be made a rule of any court of record within the state, or a rule of a particular court named in the submission. The bond must be conditioned for the faithful performance of the award.

Any matter may be submitted to arbitration, except controversies relating to the possession of, or title to real estate.^b

The abitration bond may be in the form following :

Form of Arbitration Bond.

Know all men by these presents, that I, J. N., of, [&c.,] am held and bound to J. S., of, [&c.,] in the sum of — dollars ; for the payment of which, I do hereby bind myself: Sealed with my seal. Dated this — day of — A. D. —.

The condition of this obligation is such, that if the above bounden J. N., his executors and administrators, shall in all things faithfully perform, fulfil and keep the award, and determination of E. F., of, [&c.,] and G. H., of, [&c.,] arbitrators chosen by said J. N. and J. S., to arbitrate, award and determine, concerning as well [certain matters of account now open and unsettled between them, as also all actions, causes of actions, suits, specialties, controversies and demands whatsoever, both at law and in equity, at any time heretofore existing or depending between said parties, so as the said award be made in writing, on or before the — day of — now next ensuing ; but if the said arbitrators do not make such their award, of and concerning the premises, by the time aforesaid, then if the said J. N., his executors and administrators, shall in all things faithfully perform, fulfil and keep the award, umpirage and determination of T. W., of, [&c.,] chosen as an umpire between the said parties, concerning the premises, so as the said umpire do make his award and umpirage in writing, of and concerning the premises, on or before the — day of — now next ensuing ; and so as the said arbitration be held on the — day of — now next ensuing, at the office of —, in the town of, [&c.,] with liberty as well to the said arbitrators, as also to the said umpire, to adjourn from time to time, until their award or umpirage be made up within the time aforesaid ; then this obligation to be void, or else to remain in full force and virtue ; And the said J. N. doth consent and agree, that his submission to the award or umpirage above mentioned, shall be made a rule of the Court of —, pursuant to the statute in such case made and provided.

[SEAL.]

SEC. II. HOW THE AWARD MADE OUT AND PUBLISHED, IN SUCH CASE.

The award of the umpire or arbitrators, or a majority of them, must be drawn up in writing, and signed by such umpire or arbitrators, or a majority of them; and a true copy of the award or umpirage, must, without delay, be delivered to each of the parties in interest.*

SEC. III. PROCEEDINGS TO ENFORCE THE AWARD, BY JUDGMENT, OR BY ATTACHMENT.

The party who desires to enforce the award, by proceeding in court, must be able to make the following proof to the court by affidavits :

1. The due execution of the arbitration bond.⁴
2. That the opposite party was furnished with a copy of the award, without any unreasonable delay,* and at least ten days before the term, at which application to enforce the award, is made.⁴
3. Before an attachment can issue, that the opposite party has neglected or refused to perform the award. This, in many cases, will require proof of demand and refusal, or proof of tender or performance of some act, on the part of the party who applies to the court to enforce the award; depending, however, upon the terms of the award.

The first step to be taken in court, to enforce the award, is, to file the award and arbitration bond in the court, named in the submission; or, if no particular court be named therein, then in the Court of Common Pleas of the county where the arbitration was held.⁵

Notice of the filing of the award should, probably, be given to the opposite party; though nothing is said, upon the subject, in the statute.

The court, at the next term thereof after filing the same, as above mentioned, if no legal exceptions be made or taken to the award or other proceedings, will, on proof of the three particulars above mentioned, and proof of notice to the opposite party of the application, enter up judgment upon that part of the award which is for the payment of money, as on a verdict of a jury between the parties; and issue execution thereon as in other cases, immediately after the amount specified in the award is due and payable.*

But, so far as the award or umpirage directs the performance of any act or thing, other than the payment of money, the party disobeying the same, is liable to be punished, as for a contempt of court, either by attachment, sequestration or execution, as the nature of the case may require.¹

(c) Swan's Stat. 68, sec. 7.

(d) Id. 69, sec. 12.

(e) Id. 68, sec. 7.

(f) Id. 69, sec. 12.

(g) Id. 68, § 8.

(h) Id. lb. § 9. It would seem, from the language of the statute, that the judgment might be entered up before the money is due, with an award of execution after due.

(i) Id. lb. § 10.

 Setting aside Award—Form of Award.

If any legal defects appear in the award, or other proceedings, or if it is made to appear, at the term of the court to which the award and arbitration bond are entered, on oath or affirmation, that the award or umpirage was obtained by fraud, corruption, or other undue means, or that the arbitrators or umpire misbehaved, the court may set aside the award or umpirage, or make such order thereon as may be just and right.

The court will not enter into an examination of the merits, upon an application to set aside the award,^k unless it appear, manifestly, from the merits, that the arbitrators have acted dishonestly or corruptly;^l so that, in general, every ground for relief against an award, with this exception, is as available at law as in equity.^m

The award will be set aside if it do not pursue the submission in every material point;ⁿ or if it omit to decide some of the specific matters referred;^o or if the submission was a general one, if it omit matters pointed out at the time of the hearing;^p or if it include matters not submitted, nor incidental to the matters submitted;^q or be made after the time, or at a different place, from that mentioned in the submission;^r or if one part be inconsistent with another, or it be so uncertain, that the rights and duties of the parties remain in doubt;^s or if it be made after the submission is revoked; or if, after the award was made, the parties agreed to submit the controversy anew.^t

But an award may be good in part and bad in part; and if the objection to the award goes only to a distinct part, and if that part were struck out, the residue of the award would properly cover the submission and is unconnected with the part that is bad, then the award will be void as to the part only that is bad.^u

 SEC. IV. FORMS RELATING TO AWARDS WHICH ARE MADE A RULE OF COURT.

 1. *Form of Award.*
An Award by two Arbitrators, on a Submission by Arbitration Bond.

To all to whom these Presents shall come, we, E. F., &c., and G. H., of, &c., send Greeting:

Whereas J—— N——, of, &c., and J—— S——, of, &c., by their several writings obligatory, sealed with their seals, and dated the —— day of ——, A. D. ——, became and were respectively bound to each other, in the sum of

(j) Swan's Stat. 69, § 11.

(k) 2 Bur. 701; 1 Str. 301.

(l) 1 Saund. 327 d.

(m) 3 Bur. 1259; 7 Ohio Rep. (Part 1) 98.

(n) 1 Stt. 116; 3 Ohio Rep. 510; 7 Ohio Rep. (Part 1) 98; 8 T. R. 571.

(o) 16 East, 445; 7 East, 80; 8 East, 445; 244; 1 Wend 326; 7 Mass. 399. 12 Johns. 311.

(p) 3 Ohio Rep. 510.

(q) 3 Doug, 406; 5 East, 244; 3 Ohio Rep. 286.

(r) 3 Ohio Rep. 266; Willes, 66.

(s) 16 Johns. 285; 5 Ohio Rep. 536.

(t) 2 Cowen, 638; 8 Mass. 398; 13 Mass.

Form of Award.

— dollars, with conditions thereunder written, that they, their executors and administrators, should, in all things, perform, fulfill and keep the award and determination of us, the said E. F. and G. H., arbitrators chosen by said J. N. and J. S., to arbitrate, award and determine, concerning, [*as in the bonds,*] as well certain matters of account then open and unsettled between them, as also all, and all actions and causes of action, suits, specialties, controversies, and demands whatsoever, whether at law or in equity, at any time theretofore existing or depending between the parties aforesaid, so as the said award should be made in writing, on or before the — day of — then next ensuing; but if we, the said arbitrators, should not make such our award, of and concerning the premises, by the time aforesaid, then the said J. N. and J. S., their executors and administrators, should, in all things, faithfully perform, fulfill and keep the award, arbitrament, umpirage and determination of T. W., of, [*&c.*] a person chosen as an umpire between the said J. N. and J. S., concerning the premises, so as the said umpire should make his award and umpirage, in writing, on or before —, the — day of — then next ensuing; and so as the said arbitration should be held on the — day of —, A. D. —, at the office of —, in the town of —, with liberty as well to us, the arbitrators aforesaid, as to the said T. W., umpire as aforesaid, to adjourn from time to time, until the said award or umpirage should be made up, as aforesaid; the said J. N. and J. S. thereby consenting and agreeing that their said submission should be made a rule of the court of —, pursuant to the statute in such case made and provided: Now know ye, that we, the said E. F. and G. H., the arbitrators aforesaid, having taken upon us the burden of the said reference, did hold said arbitration, between the said parties, on the — day of —, A. D. —, [*and by adjournment from time to time thereafter, if the fact be so,*] at the office of —, in the town of —, being the time and place specified in the said conditions of the said several writings obligatory, for holding the said arbitration, and having heard, examined, and considered the allegations, witnesses, and evidences, of both the said parties, do hereby find and award, of and concerning the premises, in manner and form following:

First, we do award, arbitrate and determine, by these presents, that the said J. S., his executors and administrators, do and shall pay to the said J. N., his executors, administrators and assigns, on demand, the sum of five hundred dollars.

Secondly, we do further award, arbitrate and determine, that the said J. S. do pay the costs of this reference, taxed at — dollars.

And, lastly, we do further award, arbitrate and determine, that each of said parties do, respectively, on demand, make, execute and deliver, each to the other, a general release, in writing, and under their respective seals, of all, and all manner of actions, causes of action, suits, specialties, controversies, and demands whatsoever, from the beginning of the world to the date of these presents.

Proof of the Execution of the Arbitration Bond, &c.

Signed and published by the within named E. F. and G. H., as their award, this — day of —, A. D. —.

E. F.,
G. H.

If the award be by an umpire, after reciting as above, say:] And whereas the said arbitrators did not make any award in the premises, within the time for that purpose limited as aforesaid; and by writing under their hands, dated the — day of —, now last past, did give notice thereof to me, T. W., umpire as aforesaid: Now, [&c.]

The following clauses may be inserted, according to circumstances:

To deliver Goods.—That the said J. N. shall freely deliver up to the said J. S., on request by him to be made, one mahogany bureau, one silver tankard, &c., all of which were the goods of one O. P., and were by him heretofore sold to the said J. S.

To deliver Writings.—That the said J. S. shall deliver up to the said J. N., at the dwelling house of J. N., in —, within sixty days from the day of the date hereof, the deeds, leases, bills of exchange, notes of hand, &c., following, to wit, [*giving a particular description.*]

To give a Bond, &c., for the Payment of Money.—That the said J. N. shall, within ten days from the time he shall have notice of this award, well and truly execute and deliver to the said J. S., his bond, in common form, to the said J. S., in the penal sum of one thousand dollars, conditioned for the payment of five hundred dollars to the said J. S., within six months from the date hereof, [*or his note of hand, &c.*]

2. *Form of Affidavit of the Execution of the Arbitration Bond and Award*
—that a copy of the Award was furnished to the opposite Party, &c.

J. N. }
v. } — Com. Pleas.
J. S. }

The State of Ohio, — County, ss.

A. B., of lawful age, being duly sworn, deposeth and saith, that he is acquainted with the handwriting of the above named J. S.; and the name of J. S., at the foot of the arbitration bond, between the above named parties annexed to this affidavit, is the proper handwriting of said J. S.; that this affiant is acquainted with the handwriting of E. F. and G. H., and that their names, at the foot of the award hereunto annexed, are of the proper handwriting of the said E. F. and G. H., respectively.

And this affiant further deposeth and saith, that on the — day of —, A. D. —, [*at least ten days before the term,*] he delivered to the said J. S., in

Judgment on Award.

person, a true copy of said award; and at the same time, [*here state the concurrent acts, if any, which the party, desiring to enforce the award, was bound to do.*] And this affiant also, at the same time, for and on behalf and by authority of said J. N., demanded of the said J. S. the said sum of five hundred dollars, awarded to said J. N. by said award; but said J. S., did not then, or any time since, pay the same, or any part thereof, to this affiant, or to said J. N., or to any person in behalf of said J. N., as affiant verily believes; and that, [*&c., setting out the other particulars of the award and neglect or refusal to perform it.*]

And this affiant further deposeth and saith, that, on, [*&c.,*] he served the said J. S., in person, with a written notice, a copy of which is hereunto annexed, marked (B).

3. *Notice marked (B).*

To J. S.:

Sir—On, [*&c.,*] I shall file in the Court of Common Pleas of —, the Arbitration bond entered into between us, on, [*&c.,*] and the award made under said submission by E. F. and G. H., for the purpose of enforcing the performance by you of said award, &c.

I am, &c.,

J. N.

[*Date.*]

4. *Form of Judgment on Award of Money.*

J. N. }
 v. }
 J. S. } In Arbitration.

This day came the said J. N., by Mr. S. his attorney, and it appearing to the satisfaction of the court, that the arbitration bond between the above parties, filed in this court on — last, was duly executed by the said J. S., and that a true copy of the award between the above parties, also filed in this court on — last, was delivered to the said J. S. more than ten days before the present term of this court*; and it further appearing to the satisfaction of the court, that the said J. S. has not paid the sum of five hundred dollars awarded to the said J. N., in and by the said award, though due demand thereof has been made; Therefore it is considered, that the said J. N. recover against the said J. S. the said sum of five hundred dollars, so awarded to him as aforesaid; and also his costs in this behalf expended, taxed to — dollars;

 Proceedings in Attachment, on Award.

and let the said J. N. have his execution thereof, according to the form of the statute in such case made and provided.

5. *Form of Orders, &c., to enforce performance of an act, other than the payment of Money.*

*Follow the preceding form to the *, and then proceed as follows :]* — And that, by the terms of said submission, the said award was to be made a rule of court ; and it further appearing to the court, that by said award, it was awarded and determined that, [*&c. Here state the act to be done.*] It is therefore ordered, that said J. S. perform and fulfill the said matters, on his part to be done, performed and fulfilled. Continued.

Order for Attachment, in case the above order is not complied with.

J. N. }
 v. } In Arbitration.
 J. S. }

It appearing to the satisfaction of the court, and affidavits herewith filed, that the rule entered herein at our last term, ordering the said J. S. to perform and fulfill the award filed herein, has not been complied with, but the same has been disobeyed, by said J. S.; it is, on motion of J. N., ordered, that an attachment issue against the said J. S., returnable [*forthwith, or at our next term,*] to answer for his contempt in the premises.

The form of the attachment can be readily made out, from the form already given¹ of an attachment against a witness ; introducing, at the words, “by not appearing,” &c., in that form, the following: By disobeying an order of said court, whereby he was ruled to perform and fulfill a certain award made under a submission between the said J. S. and one J. N., filed in said court ; and further to do, [*&c.*]

*Complaint and Interrogatories— In Attachment for Contempt.**

— Common Pleas.

The State of Ohio, — County, ss.

The following is a statement of a charge against J. S. of contempt in disobeying an order of the court of Common Pleas of — county :

The said court heretofore, to wit, at their — term A. D. —, made the following order, in substance, in a certain proceeding in arbitration, therein pending before them ; wherein one J. N. was party plaintiff, and the said J. S. party defendant : [*Here copy the order of the Court.*

(1) Ante, 886.

*m) See Swan's Stat. 211, 212, as to contempt.

Reference of Suit Pending.

And the said J. S., in contempt of said Court, and of the state of Ohio, hath disobeyed and wholly neglected [and refused] to perform said order of said court; wherefore the state of Ohio, by S. T., prosecuting attorney of said county, prays that the following interrogatories may be administered to the said J. S., touching the charge of contempt aforesaid; and that the said J. S. may be further dealt with, &c.

First interrogatory. Did you or not, execute the arbitration bond, to J. N. now on file in this Court? Declare.

Second interrogatory. Did you or not, at any and what time, receive a copy of the award, made under said arbitration bond, and now on file in this Court? Declare.

Third interrogatory. Did you or not, at any and what time, deliver to the said J. N., at his dwelling house, or elsewhere, the deeds, leases, [&c., here stating the acts to be done for which the party is in contempt.

Judgment of the Court on the Attachment.

The State of Ohio.	}	In Attachment for Contempt.
v.		
J. S.		

This cause came on to be heard upon the complaint, in writing, and interrogatories and answers thereto, filed; and was argued by counsel; on consideration whereof, the Court do find, that the said J. S. did not deliver, [&c., as in the preceding order,] and that said J. S. hath disobeyed the order of this court, made at our last term, in that behalf, and is guilty of contempt. It is therefore ordered, that he stand committed to the jail of this county, there to remain in close custody, until he shall comply with said order of the Court, and perform said award in the premises above mentioned; and it is further ordered that he pay the costs, [&c.]

SEC. IV. REFERENCE OF A SUIT PENDING, TO ARBITRATION.

1. *Form of Order of Reference waiving all Exceptions, &c.*

This day came the parties by their attorneys, and by consent, submit all matters in difference between them [in this suit] to the final determination of G. S. and T. S., and in case they disagree, to the determination of such other person as they may choose for umpire, so as said award be ready to be delivered to either of said parties, in writing, on or before the first day of the next term of this Court, and which award or umpirage, the parties agree shall be entered up at the next term as a judgment of this Court, and to such award or umpirage, or the judgment thereon, no exceptions, on account of form, substance or otherwise, shall at any time be taken; and the same is ordered accordingly; and thereupon this cause is continued.

Reference of Suit Pending.

2. *Award on the Above.*

We, the undersigned, Arbitrators appointed by the [within] rule of Court,* having notified and met the parties, and heard their several allegations, proofs and arguments, and duly considered the same, do award and determine, that the within named A. B. shall recover nothing of the within named C. D., [*or that neither of the within named parties shall recover any thing of the other,*] and that each party shall pay his own costs of Court. And that the said — shall pay the costs of this reference, which are taxed at — dollars.

Dated, [&c.]

G. S., }
T. S., } Arbitrators.
R. N., }

3. *Form of Order of Reference in the Common Form.*

This day came the parties by their attorneys, and by their consent, it is ordered, that all matters in difference, [in this cause, *or*, between the parties in this cause,] be referred to the award and determination of A. C., Esquire, so as the said A. C. shall make and publish his award in writing, under his hand, and ready to be delivered to the said parties, or their attorneys, or such of them as shall desire the same, on or before the — day of — now next ensuing, with liberty to the said arbitrator, by indorsement under his hand upon an authenticated copy of this rule, to direct that an order of [this Court, *or say*, any Judge of this Court,] shall be applied for, at the instance of either party, to enlarge the time for making his said award, if he shall see necessary; and that the said parties shall do, perform, fulfill, and keep such award so to be made as aforesaid. And by the like consent as aforesaid, it is further ordered, that the costs of the cause abide the event of the said award, and that the costs of the reference and of this rule, be in the discretion of said arbitrator, who shall direct and award by whom and to whom, and in what manner the same shall be paid; and the plaintiff and defendant respectively be examined upon oath, if thought necessary by the said arbitrator; and that the said parties, or their attorneys, do produce before the said arbitrator, all books, papers and writings touching and relating to the matters in difference between the said parties, as the said arbitrator shall think fit; and that neither of said parties shall [bring any action or suit in any Court of law or in equity, against the said arbitrator, for what he shall do in the premises, or] bring or prefer

(a) If only two of the arbitrators agree, say, having notified and met the parties," &c.,—and
"We, the undersigned, (a major part of the ar- it should be signed :
bitrators appointed by the [within] rule of Court,
G. S. the other arbitrator, who has not signed
the award, having been present at the hearing,)

T. S., } A major part of
R. N., } the Arbitrators.

Reference of Suit Pending.

any bill in equity against each other, of and concerning the premises so as aforesaid referred. And by the like consent as aforesaid, it is lastly ordered, that if either party shall, by affected delay, or otherwise, willfully prevent the said arbitrator from making his said award, he shall pay such costs to the other as this Court shall think reasonable and just; and thereupon this cause is continued.

4. *Award on the Above.*

To all to whom these presents shall come, I, A. C., Esquire, of, [&c.,] send Greeting :

Whereas at the — term of the Court of Common Pleas of the county of —, A. D. —, in a certain cause then pending in said Court, wherein J. N. is plaintiff and J. S. is defendant, in a plea of [Assumpsit] by consent of parties, it was ordered, in the words following, that is to say, "This day came the parties," [&c., as in the order to the end;] Now, know ye, that I, the said A. C., having taken upon myself the burden of the said reference, and having heard, examined and considered the allegations, witnesses and evidences of both of the said parties, do hereby award, order, and finally determine the said cause in favor of the said plaintiff; And I do hereby find and award, that the sum of five hundred dollars was and still remains due from the said defendant to the said plaintiff; And I do further award and direct, that the said defendant, do, upon demand, pay to the said plaintiff, or his attorney, the sum of five hundred dollars, together with the costs of this suit, to be taxed; and that the said cause be no further proceeded in; And I do further award and direct, that each of the said parties do pay and bear their own costs of this reference; and that the said plaintiff do pay the expenses of this my award, and that the said defendant do, upon demand, repay to the said plaintiff one moiety thereof.

Signed and published by the within named A. C.,
as his award, this — day of — A. D. —.

A. C.

5. *Judgment, &c.*

J. N. }
v. } On Reference to Arbitration.
J. S. }

It appearing to the satisfaction of the Court, that the award of — filed

Reference of Suit Pending.

herein, was duly made and published, in pursuance of the order of reference, entered herein at our [last] term, It is considered by the Court, [*&c., here enter judgments for the money part of the award.*] And it is ordered that, in pursuance of said award, [*here enter such parts of the award as require either party to do any act other than to pay money.*]

CHAPTER XLIV.

WARRANT OF ATTORNEY FOR THE CONFESSION OF JUDGMENT.

A warrant of attorney to confess judgment, need not be by deed; nor does it require an attesting witness,^a except when executed by a person in custody, upon mesne process, in which case, it will be void, unless some attorney, on behalf of such person in custody, and expressly named by him, be present, and sign the warrant as a witness.^b

A joint warrant of attorney to confess a judgment, by an infant and another, may be vacated against the infant only.^c

We have already seen,^d that where a judgment is taken against a firm, on a warrant executed under seal by one partner, without the consent of the other, the judgment will be set aside at a subsequent term, on motion of the latter.^e

But a warrant of attorney, executed by one partner for himself and co-partner, in the absence of the latter, but by his consent, is a sufficient authority for taking judgment against both.^f

When the liability is joint, and not joint and several, taking a warrant of attorney from, and judgment against, one of the joint debtors, will, it seems, discharge the others.^g

A warrant of attorney to confess judgment, cannot be revoked.^h But the death of either party, in general, vacates the warrant.ⁱ

Yet if the warrant of attorney be to enter up judgment in favor of A., his executors, or administrators, it seems, that, on the death of A., judgment may be taken in the name of the executors or administrators.^j

If the warrant is in favor of two persons, judgment may be entered in favor of the survivor.^k

But when the warrant is executed, jointly by two, judgment cannot be taken against the survivor, unless the terms of the warrant of attorney authorize it.^l

If the warrant is executed in favor of a feme sole, who afterwards marries, the judgment may be taken in the names of the husband and wife.^m But it seems, the marriage of a feme sole before judgment, vacates a warrant of attorney previously executed by her.ⁿ

(a) 5 Taunt. 264; Tidd, 546; and see 4 East. 431; 1 Chit. Rep. 707.

(b) Swan's Stat. 665, sec. 76.

(c) 2 Blac. Rep. 1133; 1 Chit. Rep. 708, n.

(d) Ante, p. 1001.

(e) 7 Ohio Rep. (part 2.) 175.

(f) 1 Chit. Rep. 707; Tidd. 548; but see 10 Moore, 389; 3 Bing. 101, same case.

(g) 18 Ohio Rep. 279.

(g) 2 Ld. Raym. 766, 850; 1 Salk. 87; 2 Esp. Rep. 565.

(h) 2 Stra. 718; 1081; 8 T. R. 257.

(i) Tidd. 551.

(j) 1 Wils. 312; 2 M. & S. 76; 7 Taunt. 453; 2 Blac. Rep. 1301.

(k) 15 East. 592; 7 Taunt. 453; see 1 Chit. Rep. 315, note.

(l) 12 Mod. 383; 1 Salk. 117.

Its requisites — Proceedings on — Setting aside Judgment.

In entering judgment upon a warrant of attorney, the authority must be strictly pursued. Thus, judgment cannot be entered against two persons on a warrant of attorney to confess a judgment against three persons, one of whom refused to execute it.^m So, if the warrant authorize a judgment at a particular term, a judgment cannot be taken after the term.ⁿ But if it authorize the confession generally, or at any time after a particular day, or at, or after, a particular term, or the like, judgment may be taken at any time after the time specified.

When the authority has not been pursued as in the cases above mentioned, the court, on motion, will set aside the judgment.

Every warrant of attorney should be given voluntarily, and for a good consideration.^o

It must not include attorneys fees.^p If it be obtained by fraud or misrepresentation,^q the court will order it to be delivered up, if in the hands of an attorney; or if judgment has been entered upon it, will set aside the judgment and proceedings, which have been had under it, and order it to be delivered up.

The Court of King's Bench, in England, will set aside a judgment, founded on a usurious security, without compelling the defendant to repay the principal and interest.^r

In general, judgment is taken on a warrant of attorney, without any notice whatever being given to the defendant. When, therefore, the judgment is irregularly entered, or the defendant had, when the judgment was entered, a well founded objection to its entry, which would have induced the court to have set the case down for an issue and trial, the defendant may move the court to set aside the judgment. For this purpose, the application should be made during the term in which the judgment was taken, if the defendant had notice in time to make the application during that term; but if he had not such notice in time, then the application should be made at the term next after notice of the entry of the judgment. Upon affidavits showing sufficient cause for setting aside the judgment, and that there has been no laches, the court will set aside the judgment, and give the defendant leave to plead, and put him upon such terms as will prevent delay, in the trial of the issue.^s

The party holding the warrant, files a declaration in the usual form, and, in general, though perhaps unnecessary,^t some attorney of the court files a plea in the nature of a cognovit, in the form following, if in Assumpsit:

(m) 1 Chit. Rep. 322.

(n) 1 Mod. 1; 7 Id. 53.

(o) Tidd. 547.

(p) 13 Ohio Rep. 250.

(q) Cowp. 727; 1 Bos. & Pul. 270; 4 Barn. & Ald. 92; 4 Taunt. 683.

(r) 4 Barn. & Ald. 92; as to practice in such case in the Common Pleas of England, see 1 Taunt. 413.

(s) Id. Ib.; and see 7 Ohio Rep. (Part 2) 175; Cowp. 727.

(t) 3 Ohio Rep. 272.

Confession—Form of Warrant.

C. D. }
 ats. } — Com. Pleas. — Term, A. D. —
 A. B. }

And the said C. D., by S. R. his attorney, (under and by virtue of a warrant of attorney herewith filed,) comes and waives the issuing and service of process herein, and enters the appearance of the said C. D.; and for plea, says that he cannot deny the action of the plaintiff, nor but that he, the said defendant,* did promise as the plaintiff hath complained, nor but that the plaintiff hath sustained damages in the premises to the amount of —; and confesses judgment therefor and costs; and all errors are hereby released.

If in Debt, the form may be as follows:

*As in the preceding form to the *]*—doth owe the plaintiff — dollars debt, and — dollars — cents, damages, for the detention thereof, as the plaintiff hath complained; and confesses judgment therefor and costs; and all errors are hereby released.

S. R., Attorney for C. D.

The statute provides, that the attorney confessing a judgment, shall produce to the court his warrant for doing so, if required; and a copy of the warrant shall then be filed with the clerk.^a In general, the original warrant is filed, instead of a copy.

Form of Warrant of Attorney for the Confession of Judgment.

I do hereby authorize and empower A. B., or any other attorney at law in the State of Ohio, to appear in any court of record in said State, at any regular term of such court, and waive the issuing and service of process, and confess a judgment against me, and in favor of J. S., for the sum of — dollars, and costs, and thereupon to release all error and writs of error.

Y. X., [Seal.]

Dated, &c.

(u) Swan's Stat. 665, § 76. For the form of the Judgment in Assumpsit, on confession, see ante, 938. For the like in Debt, see ante, 965.

CHAPTER XLV.

PARTITION.

SECTION I. IN WHAT CASES.

- II. WHERE THE PETITION MAY BE FILED.
 - III. PARTIES TO THE PETITION.
 - IV. WHAT THE PETITION MUST CONTAIN.
 - V. FORMS OF PETITIONS.
 - VI. NOTICE TO THE PARTIES.
 - VII. PROCEEDINGS AT THE FIRST TERM.
 - VIII. PROCEEDINGS UNDER THE ORDER OF PARTITION.
 - IX. PROCEEDINGS ON THE RETURN OF THE WRIT.
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SEC. I. IN WHAT CASES.

The statute provides,^a that all joint tenants, tenants in common and coparceners, of any estate in lands, tenements or hereditaments, may be compelled to make or suffer partition of such estate. The estate must be a legal one.

It will be observed, that the statute is exceedingly broad in its terms; and is applicable, as well to estates of freehold, as estates for years. But a party who has not a right to the present possession, but has a future contingent interest in an undivided share of real estate, cannot, perhaps, sustain a suit for a partition.^b

But where a person has a dower estate in a tract of land, and also an undivided share of the remainder in fee, he may have partition.^c

Where land is bought with partnership funds, and conveyed to the partners, they take as tenants in common; and if one dies, his share descends to his heirs; and if such share be sold by his administrator, to pay debts, the purchaser takes the legal title, and may demand partition.^d

Where there are several tracts, if there be any one in which the demandant is not a tenant in common with all the owners, such tract should not be inclu-

(a) Swan's Stat. 613.

(b) See 2 Paige, 387.

(c) 11 Ohio Rep. 389. This case was in chancery; but the court say they decide it upon the

analogies of the statute, as well as upon the principles which govern courts of chancery.

(d) 5 Ohio Rep. 264.

In what Case — Where Petition to be filed, and Parties.

ded in the petition; for, the petitioner must be a tenant in common with all the owners of each tract to be partitioned.^e

When one tenant in common has conveyed his entire right in several parcels of land, by metes and bounds, to several purchasers, so that each purchaser's title and possession are separate and distinct, his co-tenant cannot unite all the purchasers in one petition, for a general partition; but he must bring separate suits against each purchaser, and take his share out of each particular tract. But the one who first purchases a specific part of a defined tract, from a tenant in common, cannot compel his co-tenant to take his share in another portion of the tract, sold by the same grantor to a later purchaser.^f

As one tenant in common can work a division of the common property, by conveying his share by a deed, defining it by metes and bounds; so, the tenant, making this separation of interest, and his heirs, are bound by it; especially, if the deed contains a warranty; and it may be accepted and ratified by the co-tenants.^g

Where the rights of some of the coparceners to a part of the estate, are barred by an adverse possession, and the same part, in a partition of the whole estate, is allotted to another coparcener, who is within the saving clause of the statute of limitations, the latter can hold only his original share in the part allotted to him.^h

SEC. II. WHERE THE PETITION MAY BE FILED.

If the estate or estates are situated in one county, the proceedings in partition, must be had in the Court of Common Pleas of such county; but if situate in two or more counties, the proceedings may be had, either in the Supreme Court, when that court shall be in session, in any one of the counties where a part of the premises to be divided shall be situate, or, in the Court of Common Pleas in any one of the counties where a part of the premises shall be situate, at the election of the demandant of partition.ⁱ

SEC. III. PARTIES TO THE PETITION.

The statute requires the parties in interest, whose names are known to the demandant, to be set forth in the petition.^j The widow also, if any, entitled to dower, must be made a party to the proceedings.

If there be minors who have guardians, they are also generally named, as they have a right to act for their wards in the proceedings.^k

(e) 13 Ohio Rep. 518.

(f) 7 Ohio Rep. (Part 2) 129.

(g) 9 Ohio Rep. 126.

(h) 10 Ohio Rep. 135.

(i) Swan's Stat. 613, sec. 1.

(l) Id. 614, sec. 2.

(m) Id. 617, sec. 14.

What the Petition to Contain, and its Form.

If any of the parties in interest are married women, their husbands, if living, must be named.^a

The proceeding is one in rem, and the statute does not require the parties in interest to be actually made parties defendants, but simply to be named in the petition. It is, however, a very common practice, to make the parties in interest by express terms, as in bills in chancery, parties defendants.^a

The proceeding in fact, is, in no just sense, adversary; and has, therefore, strictly no proper parties.^b

A guardian for minors, who all claim in one right, may institute proceedings for partition without process.^c

SEC. IV. WHAT THE PETITION MUST CONTAIN.

The statute requires the petition to set forth the nature of the title of the demandant; the tract or tracts of land, tenements or hereditaments of which partition is demanded; and the name or names and place of residence of each joint tenant, coparcener or tenant in common, with such demandant, if they shall be known to such demandant; and any widow entitled to dower, must be made a party to the proceedings, unless the dower shall have been previously assigned.^d

The title and interest of the several tenants should be set forth truly.^e

The first step to be taken is, to file the petition with the clerk of the proper court.

SEC. V. FORMS OF PETITIONS.

Form of Petition — Real Estate Descended.

To the Court of Common Pleas of the county of —, and state of Ohio:

Your petitioner, A. B., [&c.], of, [&c.], respectfully represents, that on or about the — day of — A. D. —, one D. B., of — county, died, intestate, seized of an estate in fee simple in the following lands and tenements, situate in [said] county, and described as follows: [*Here describe the premises.*]

That said premises descended to the following persons, the children [and grand children] of said D. B., deceased, and is now owned by them in the following proportions as coparceners, to wit:

I. Your petitioner, a son of said D. B., deceased, an undivided [third] part of said premises, in fee.

(j) Id. 614, sec. 2; Id. 616, sec. 12.

(k) 14 Ohio Rep. 502.

(n) 8 Ohio Rep. 87; see 9 Ohio Rep. 117.

(o) 13 Ohio Rep. 548. The form of petition in Mr. Wilcox's Forms and Practice, merely

names the parties in interest; and this is in accordance with the practice in the state of N. Y.

(p) 13 Ohio Rep. 548; and see 6 Ohio Rep. 269; 9 Ohio Rep. 120; 8 Ohio Rep. 415.

(q) 8 Ohio Rep. 415.

Form of the Petition.

II. E. B., a son of said D. B., deceased, who resides in the county of —, in the state of —, one undivided [third] part of said premises, in fee.

III. G. M., S. M. and R. M., infants, who reside in the county of —, in the state of —, only children and heirs of *Ellen B.*, daughter of the said D. B., deceased. The said *Ellen B.*, on or about the — day of — A. D. —, intermarried with one X. M., who resides in the county of —, in the state of —, and the said *Ellen B.*, on or about the — day of — A. D. —, died, leaving said infants, the issue of said marriage, her only children and heirs, and who are each seized in fee, of an undivided [ninth] part of said real estate, subject to the estate, in courtesy, of X. M., their father.

IV. S. B., [&c.]

Your petitioner further represents, that S. B., who resides in, [&c.,] widow of said D. B., deceased, is entitled to dower in said premises.

S. B. is the guardian of said [G. M.] duly appointed by this Court.

[Your petitioner prays, that said E. B., G. M., [&c.,]* be made parties defendants to this petition ; and] your petitioner, desiring to hold his said interest in severalty, prays [that partition of said premises may be made, *or say*, that your petitioner's interest in said premises may be set off to him in severalty ;] and that the dower of the said S. B. may be also assigned in said premises ; or if it shall appear that partition cannot, without manifest injury, be made, then that the same may be sold, or other order taken pursuant to the statute in such case made and provided.

By C. T., Attorney for Petitioner.

Form of Petition — Real Estate Devised.

To the Court of Common Pleas of the county of — and state of Ohio :

Your petitioner, A. B., [&c.,] of, [&c.,] respectfully represents, that on or about the — day of — A. D. —, one D. B., of — county, died, seized of an estate in fee simple, in the following lands and tenements situate in said county of —, and described as follows : [*Here describe the premises.*]

And your petitioner further represents, that said D. B., in his lifetime, made his last will and testament in writing, and which, after his decease, was on or about the — day of — A. D. — proved, allowed, and ordered to probate and record, by [this] Court, and is duly recorded. That, by said last will and testament, the said D. B. devised said premises, and his devisees, hereinafter named, hold said premises as follows : [*here state the devisees in the will,*] all which will more fully and at large appear, by the record of said will, in this Court.

Your petitioner further represents, that S. B., who resides in — county, in the state of —, [is entitled to dower in said premises, *or say*, declined to take under said will, and is entitled to dower in said premises.]

(r) For special averments as to proof of will, &c., see ante 417.

Form of the Petition — Notice to the Parties.

Your petitioner prays that said E. B., [*&c., proceeding as in the preceding form from the * to the end.*]

Form of Petition — Real Estate held by Deeds, &c. — Names of some of the Co-tenants unknown.

To the Court of Common Pleas of the county of —, and State of Ohio:

Your petitioner, A. B., [*&c.*] of, [*&c.*] respectfully represents, that your petitioner, together with C. D., who resides in, [*&c.*] J. K., who resides in, [*&c.*, and some person or persons whose residence and names are unknown to your petitioner,] are seized of an estate as tenants in common, in the following lands and tenements, situate in said county of —, and described as follows: [*here describe the premises.*]

Your petitioner further represents, that he has an estate [*of inheritance, or for his own life, or for the life of one R. S., or for the term of — years, as the case may be,*] in the said premises, being the one equal undivided [*moiety, or third, or fourth, or other part, according to the share the petitioner claims;*] that the said J. K. has an estate of, [*&c., describing it as above,*] in the said premises, being the one equal undivided, [*&c., specifying the share or interest, and so describing the nature of the estate, and the shares of each, if known;*] and that some person or persons, whose residence and names are unknown to your petitioner, have estates or interests in the residue, the nature and conditions of which, are to your petitioner unknown.

[*As to Dower, see the preceding forms.*]

And your petitioner, desiring to hold his said interest in severalty, prays that said C. D., [*&c.*] may be made parties defendants to this petition, and that your petitioner's interest in said premises [*and the interest of said parties in interest whose estate therein is known,*] may be set off in severalty; and if the same cannot be done without manifest injury, then that the said premises be sold, or other order taken, pursuant to the statute in such case made and provided.

SEC. VI. NOTICE TO THE PARTIES IN INTEREST.

After filing the petition, the statute requires the demandant in the petition to give notice, in some newspaper in general circulation in each county where the lands lie, a personal notice in writing, to each and every person concerned, their agent or attorney, at least forty days previously to the term of the court next after the filing the petition, setting forth the pendency and demand thereof.

The notice is usually given by publication. It may be in the form following:

Form of Notice.

NOTICE:—To C. D., [*&c., naming the parties in interest.*]

You will take notice, that on the — day of —, A. D. —, the undersigned filed a petition in the Court of Common Pleas of — county, Ohio, where the same is now pending, demanding partition of the following premises, situate in said county: [*Describe them.*]

The undersigned demands that partition be made of said premises as follows: To the undersigned, one [moiety, or third, *as the share may be;*] to C. D., E. F., [*&c.,*] each, one [sixth;] to L. M., [*&c.,*] each, one [twelfth;] and to S. M. dower in the whole.

At the next term of said court, an application will be made by the undersigned, for an order that partition may be made, &c., of said premises.

A. B.

[Date.]

 To Printer—*Publish six weeks, successively.*

SEC. VII. PROCEEDINGS AT THE FIRST TERM.

If the notice was published, or if the notice was served on the parties in interest, forty days before the term, the demandant is entitled to an order of partition upon proof thereof, and if no sufficient reason is assigned to the court by the parties in interest, why partition should not be made.^a The court may require proof of title as set forth in the petition.^b

The court may order partition only of the demandant's share, or of all the parties in interest.^c

If there be infants, it is usual, in some of the circuits, to have a guardian ad litem appointed for them, and to file their answers; though this does not seem necessary, as the whole proceeding is in rem.

If there be any defence, it is generally presented to the court in the shape of an answer, substantially as in chancery.

Three commissioners are appointed by the court to make the partition,^d whose names are usually inserted in the order of partition.^e

Affidavit of Publication.

T. C. being duly sworn says, that a copy of the *above* notice was published on the — day of —, A. D. —, in a newspaper called —, and that said newspaper was then in general circulation in the county of —.

T. C.

Sworn, &c.

(a) Swan's Stat. 614, sec. 4.

(b) 14 Ohio Rep. 502.

(c) Swan's Stat. 614, sec. 4.

 Proceedings and orders on the Petition.

Affidavit of Personal Service.

T. C. being duly sworn, says, that on — he personally gave C. D., E. F. and G. H., [*or to W. X., the agent or attorney of C. D., E. F. and G. H.*] a true copy of the above notice.

T. C.

Sworn to, &c.

Appointment of Guardian ad litem.

A. B.
v.
C. D. et. al. } In Partition.

It is ordered, that L. S. be, and he is appointed guardian ad litem to the infant defendants named in the petition herein; and the said L. S. appeared in open court and accepted said appointment.

Answer of the Guardian ad litem.

C. D. et. al. }
ats. } Petition for Partition.
A. B. }

And the infant defendants in said petition named, by L. S., their guardian ad litem, appointed by this court, for answer to said petition say, that they are of tender years and ignorant of the matters in said petition set forth, and pray the protection of the court in the premises.

By L. S., their guardian ad litem.

Form of Order for Partition.

This cause came on to be heard upon the petition, [answer, &c., and was argued by counsel;] on consideration whereof, and it appearing to the satisfaction of the court, that due notice hath been given, more than forty days previous to the present term, of the pendency and demand of said petition, as required by law, and that the demandant hath a legal right and estate in the premises described in the petition, and as therein set forth, and no sufficient reason appearing why partition should not be made, it is ordered [*or, on motion to the court by Mr. O., counsel for the plaintiff, it is ordered,*] that, by the oaths of T. O., T. P. and T. U., judicious, disinterested freeholders of the vicinity, one full and equal third part of the lands, in the said petition described, be assigned and set off to the said T. S. as her dower estate, and that by the like oaths of the same T. O., T. P. and T. U., partition be made of said lands, subject to said dower estate, in the following proportions, to wit:

- I. To the said A. B. one equal *fourth* part.
- II. To the said C. D., L. D., M. D., and S. D., each, one equal *sixteenth* part.

 Proceedings under the order of Partition.

III. To the said E. F. and R. F., each, one equal *eighth* part.

IV. And to the said G. H., one equal *fourth* part.

And it is further ordered, that a writ of partition issue to the sheriff of — county, commanding him to cause said dower to be assigned, and said partition to be made accordingly. Continued.

 SEC. VIII. PROCEEDINGS UNDER THE ORDER OF PARTITION.

In case a partition is ordered, the statute provides, that the court shall issue their writ, directed to the sheriff of their county, or, in case the estate is situate in more than one county, then to the sheriff of either of the counties in which the estate may be, commanding him that, by the oaths of three judicious and disinterested freeholders of the vicinity, (named by the court,) he cause to be set off and divided to the demandant, or each party in interest, in the petition, the parts of the estates as ordered by the court.

The commissioners must view and examine the property, after being sworn by the officer.*

The property is set apart into such lot or lots, as will be most advantageous and equitable, having due regard to the improvements, situation and quality of the different parts.†

When there are two or more tracts, the commissioners set off to each of the parties in interest his proper proportion in each; if, however, the several tracts are owned by the same persons, and in the same proportions in each tract, then the whole share of any proprietor, in ~~all the~~ tracts, may be set off to such proprietor in one or more tracts.‡ After confirmation, it will be presumed that the parties in interest held equal undivided proportions in all the tracts.⁴

If the commissioners are of the opinion that the property cannot be divided according to the command of the writ, without a manifest injury of the value thereof, they return a just valuation of the property.⁵

 SEC. IX. PROCEEDINGS ON THE RETURN OF THE WRIT.

If the commissioners return a partition, an order of confirmation is entered, unless there be some irregularity in the proceedings.

If the commissioners return that it cannot be partitioned without manifest injury, and the court approve of the return, and any one or more of the parties elect to take the property at the appraised value, the court will adjudge

(v) Swan's Stat. 615, § 5; Id. 618, § 20.

(w) Id. 615, § 5.

(x) Id. Ib. § 6.

(y) 7 Ohio Rep. (part 2,) 118.

(z) Swan's Stat. 615, § 8.

Proceedings on the return of the writ of Partition.

the property to him or them, he or they paying to the other parties, their proportion of the appraised value ; and the sheriff, by order of the court, executes a conveyance accordingly.^a If two or more elect to take, in severalty, the land, or if no one elect to take it, then the court may, at the instance of the demandant in the petition, order the property to be sold at public auction by the sheriff. The sale is conducted as upon execution, except that no new appraisement is made. The property must be sold for at least two-thirds of its value as estimated by the commissioners.^b The sale must be made at the door of the court house, unless otherwise ordered by the court.^c If upon sale made, the court approve of it, the sheriff, upon receiving the purchase money, or taking sufficient security therefor, to the satisfaction of the court, executes a deed to the purchaser.^d The money or securities taken by the sheriff, are distributed and paid by order of the court, to and amongst the several parties in interest.^e

After the property has been once offered for sale, and not sold, an alias order may issue as often as need be ; and the court may, in their discretion, order a revaluation by three judicious disinterested freeholders of the county, (to be appointed by the court,) and direct a subsequent sale at not less than two-thirds of such revaluation ; or, the court may order a sale without such revaluation, at not less than such reduced proportion or proportions of the appraised value as they may direct.^f

Guardians of minor heirs may elect to take the property for their wards ; and, indeed, are authorized to do any act, matter or thing, for their wards, under the statute, respecting the partition of real estate.^g

In order to give all parties in interest an opportunity to elect to take the land, at the valuation of the commissioners, the cause is generally continued one term for that purpose. If, however, two elect to take it in severalty, of course no one can have it ; and in such case, or, if the court are satisfied that no one desires to take the property at the valuation, the cause will not be continued for election.

The costs and expenses are taxed according to equity, having regard to the interest of the parties, and the benefit each may derive from the partition. Execution may issue therefor, against each party, to recover the costs taxed against each, respectively.^h

No appeal lies to the Supreme Court, in proceedings in partition.ⁱ The proceedings may be reviewed upon writ of error. The regularity of the proceedings cannot be inquired into collaterally.^j

When on partition by the court, the land is divided by metes and bounds, into eight shares, and a purchaser afterwards buys three of the shares, and

(a) Swan's Stat. 615, sec. 8.

(b) Id. 615, sec. 9.

(c) 45 vol. Stat. 59.

(d) Swan's Stat. 616, sec. 10.

(e) Id. ib. sec. 11.

(f) Id. ib. 617, sec. 14.

(g) Id. 617, sec. 16.

(h) 11 Ohio Rep. 254.

(i) 10 Ohio Rep. 250 ; 3 Ohio Rep. 321 ; 8 Ohio Rep. 87, 415

Forms of Report, Orders, and Deeds.

brings his ejectment to get possession of them, and afterwards the proceedings in partition are reversed on error, the purchaser, notwithstanding, takes an undivided eighth of three shares, and he may recover that much in his ejectment.¹

Report, &c., of the Commissioners.

The State of Ohio, — county, ss.

On the — day of —, A. D. —, L. M., [&c.,] the within named commissioners, were duly sworn by me, to make partition of the lands within described, and to assign dower in the same, in pursuance of the order of the court.

W. X., Sheriff of — county.

We the undersigned, commissioners, named in the writ hereunto annexed, after being duly sworn, and after viewing and examining the premises, in said writ described, do assign to the said L. G. for her dower estate, so much of said premises as are contained within the following boundaries, to wit: [*describe the dower by metes and bounds.*]

If the land cannot be partitioned, say, and we are of the opinion that said premises cannot be divided according to the command of this writ, without manifest injury of the value thereof, and do estimate the value of that part of said premises, upon which we have assigned dower, and subject to said dower, at — dollars; and we do estimate the residue of said premises, [*or if it is proper that the part upon which dower is assigned, should be sold with the residue, say,* and we do estimate said premises, subject to said dower,] at — dollars.

But if the land is partitioned, say, and we do also set off and assign to A. G., in severalty, for his share of said premises, so much of the same as is contained within the following boundaries: [*describe by metes and bounds, and so proceeding with each share.*]

Given under our hands this — day of —, A. D. —.

[Signed.]

I have executed this writ by the oaths of the within named —, whose report is hereunto annexed and returned.

W. X., Sheriff of — county.

[Date.]

Report of Partition Confirmed.

On motion to the court by Mr. O., counsel for the petitioner, and upon producing the proceedings of the sheriff, and also the report and proceedings of the commissioners hereinbefore appointed, and the same being examined, it is ordered that said proceedings and report be and the same are hereby approved

(j) 2 Ohio Rep. 110; 6 Ohio Rep. 391; 7 Ohio Rep. (Part 2,) 129; 9 Ohio Rep. 128.

Forms of Orders, &c.

and confirmed, and that the said parties hold in severalty the shares set off and assigned to each, respectively, by the said commissioners. And it is further ordered, that the costs and expenses of this suit, taxed to — dollars, be paid within — days, by the parties, in the following proportions, to wit, [&c.,] and in default thereof that execution issue therefor.

Order confirming an Election by one of the parties, and directing the Sheriff to make a Deed.

On motion to the court by Mr. O., counsel for the petitioner, and upon producing the proceedings of the sheriff, and the report and proceedings of the commissioners hereinbefore appointed, and the same being examined, it is ordered, that said proceedings and report be and the same are hereby approved and confirmed; and thereupon the said A. B., electing to take said estate at the said valuation of said commissioners, and having paid to the said C. D., E. F. and G. H., their respective proportions of the appraised value thereof, the said estate is hereby adjudged to the said A. B., and the said sheriff is ordered to execute a deed in fee simple for the same to the said A. B., according to the statute in such case made and provided. And it is further ordered, [&c., conclude as in preceding form.]

Form of Sheriff's Deed to party electing to take the Estate.

To all to whom these presents shall come — Greeting:

Whereas, on the — day of —, A. D. —, A. B., of, [&c.,] filed his certain petition in the Court of Common Pleas within and for the county of —, against C. D., E. F. and G. H., demanding partition of certain real estate, hereinafter described; and whereas, such proceedings were had upon said petition, that the commissioners appointed by said court to make partition of said estate, made report, that partition of the same could not be made without manifest injury, and that the value thereof was — dollars; and whereas, at the — term of said court, A. D. —, the said report of said commissioners was approved and confirmed by said court, and the said A. B. electing to take said estate at the valuation of said commissioners, and having paid to the said C. D., E. F. and G. H. their respective proportions of the appraised value thereof, the said court did adjudge said estate to the said A. B., and did order the said sheriff to execute a deed in fee simple for the same to the said A. B.; all of which will more fully appear, reference being had to the records of said court. Now, therefore, I, W. X., the sheriff aforesaid, in consideration of the premises, and by virtue of the powers in me vested by law, do, by these presents, grant, bargain, alien, and convey unto the said A. B., and unto his heirs and assigns forever, the said real estate, so adjudged as aforesaid to the said A. B., and which is bounded and described as follows, to wit, [describe the lands as in the petition,] with all and singular the appurtenances; to have and to hold the said premises to him, the said A. B., and to his heirs and assigns forever.

Forms of Orders, &c.

In testimony whereof, I hereunto set my hand and seal, as sheriff as aforesaid, this — day of —, A. D. —.

W. X., Sheriff of — County.

Executed and delivered }
in our presence : }
T. X.,
M. X.

The State of Ohio, — County, ss.

Be it remembered, that on this — day of —, A. D. —, before me, one of the [justices of the peace] within and for the county aforesaid, personally came W. X., and acknowledged the foregoing instrument to be his free and voluntary act and deed, as sheriff of said county of —.

S. L., Jus. Peace.

Form of Order for Sale.

On motion to the court by Mr. O., counsel for the petitioner, and upon producing the proceedings of the sheriff, and the report and proceedings of the commissioners hereinbefore appointed, and the same being examined, it is ordered, that said proceedings and report be, and the same are hereby approved and confirmed; and thereupon, neither of the parties electing to take said estate, at the valuation thereof, as returned by said commissioners, on motion of the petitioner, it is ordered, that said estate be sold at public auction, by the sheriff of said county of —, according to the statute in such case made and provided, upon the following terms, to wit, [&c.]

Form of Writ for the Sale.

[SEAL.] The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting:

In pursuance of an order of our Court of Common Pleas, within and for the county of —, at the — term thereof, A. D. —, in a certain petition for partition, now pending in said court, wherein A. B., [&c.,] is petitioner, and C. D., [&c.,] are defendants, we command you that, without delay, you proceed to sell, at public auction, the lands and tenements in the said petition described, to wit, [*describing the lands as in the petition.*] and that your proceedings in the premises you make known to our said Court of Common Pleas, at their next term; and have you then there this writ.

Witness A. C., Clerk of our said Court of Common Pleas at —, this — day of —, A. D. —.

A. C., Clerk.

Form of Confirmation of Sheriff's Sale.

On motion to the court by Mr. O., counsel for the petitioner, and upon pro

ducing the proceedings of the sheriff, and the sale of the premises by him made in pursuance of a former order of the court, and the same being examined and found by the court, in all respects, in due form of law, it is ordered, that said proceedings and sale be, and the same are hereby approved and confirmed, and that the said sheriff execute and deliver to the said purchaser a deed in fee simple for the said lands and tenements, by him sold as aforesaid. And it is further ordered, that the costs and expenses of this suit be paid out of the said moneys, in the hands of the sheriff, in the following proportions, to wit: A. B. one-sixth, &c., amounting to — dollars; and that the said sheriff distribute the residue of said moneys between the said parties, in the following proportions, to wit: To A. B. — dollars; to C. D. — dollars, &c.

Form of Sheriff's Deed to Purchaser.

To all to whom these presents shall come, Greeting :

Whereas on the — day of —, A. D. —, A. B. of, &c., filed his certain petition in the Court of Common Pleas, within and for the county of —, against E. F., G. H. and C. D., demanding partition of certain real estate, hereinafter described; and whereas such proceedings were had upon said petition, that at the — term of said court, A. D. —, the sheriff of said county of — was ordered to sell said real estate at public auction: whereupon the said sheriff, in pursuance of said order, having caused the same to be duly advertised, did, on the — day of —, A. D. —, sell said real estate at public auction, to T. S., for the sum of — dollars; which sale was, afterwards, at the — term of said court, A. D. —, approved and confirmed, and the said sheriff ordered to execute and deliver a deed in fee simple to the said purchaser, for said real estate; all which will more fully appear, reference being had to the records of said court. Now, therefore, I, W. X., sheriff as aforesaid, in consideration of the premises, and by virtue of the powers in me vested by law, do by these presents grant, bargain, alien and convey, unto the said T. S., and unto his heirs and assigns forever, the said real estate, so sold as aforesaid, and which is bounded and described as follows, to wit, [*describe the land as in the petition.*]

To have and to hold the said premises, with all and singular the appurtenances, to him, the said A. B., and to his heirs and assigns forever.

In testimony whereof, [*conclude as in sheriff's deed, ante 1242.*]

CHAPTER XLVI.

HABEAS CORPUS.

SECTION I. IN WHAT CASES ALLOWED.

- II. THE APPLICATION FOR THE WRIT ; AND FORM OF THE APPLICATION.
- III. THE ALLOWANCE OF THE WRIT.
- IV. THE ISSUING AND FORM OF THE WRIT.
- V. THE SERVICE, EXECUTION AND RETURN, TO THE WRIT.
- VI. PROCEEDINGS AFTER THE RETURN OF THE WRIT, WITH FORMS.

SEC. I. IN WHAT CASES ALLOWED.

Any person, deprived of his liberty, under pretence of legal authority, is entitled to a habeas corpus, unless actually convicted of some crime or offence, for which he stands committed, or is committed for treason or felony, the punishment whereof is capital, and the crime plainly and specially expressed in the warrant of commitment.*

The statute of 1847^b seems to contemplate the issuing of a habeas corpus, by a judge of this state, where a person is in the custody of a marshal, deputy marshal, or other like officer of the United States. And perhaps this can be done, when such officer is not acting under color of process of the United States actually in his hands, or in a matter within the jurisdiction of the courts of the United States. But it may admit of doubt, whether the application should not be made to a judge or a judicial officer of the United States, in case the officer holds the prisoner in custody under United States process, and for a crime or matter within the jurisdiction of the United States courts.*

SEC. II. THE APPLICATION FOR THE WRIT, AND FORM OF THE APPLICATION.

The first step is, to make out a written application to a judge of the Supreme Court, or a president or associate judge of the Court of Common Pleas ; or to the Supreme Court or Court of Common Pleas, in term time.*

(a) Swan's Stat. 433, sec. 1.

(b) 45 vol. Stat. 45, sec. 1.

(c) Conk. Pr. 407 ; 9 Johns 239 ; see 5 Binn. 512. As to habeas corpus to discharge a minor or other person who has enlisted in the United States service, see 24 Pick. 227 ; 12 New Hamp-

shire, 194 ; 2 South. 555 ; 11 Mass. 63, 67, 83 ; 9 Johns. 239 ; 10 Johns. 328 ; 7 Cowen 471 ; as to habeas corpus for a child, see 16 Pick. 203 ; 2 Root 461 ; 3 Mason 482 ; 2 South. 545 ; 5 Binn 520.

(e) Swan's Stat. 433, sec. 1 ; Id. 222, sec. 3, 4.

Form of the Application.

This application can be made by the party himself, or by any other person in his behalf.¹

If the applicant is imprisoned under legal process, the application can be made without any accompanying affidavit; 'but a copy of the commitment or a cause of detention is presented to the judge, and the application may be in the form following :

To J. S., one of the Judges, [&c.]

C. D., of, [&c.] respectfully represents, that [he or, say X. L., or if the name is uncertain or unknown, say, a certain person, whose name is unknown, and then describe the person in any way so as to make known who is intended, and then add : which said person] is imprisoned by [S. S., or say the Sheriff, or say Coroner, or otherwise, designating the name of the office, or if both the name of the officer and the name of his office are unknown or uncertain, insert a fictitious name or assumed appellation, adding, an assumed appellation, the real name of said person being uncertain and unknown to your petitioner, and said imprisonment is] without any legal authority,* under color of a certain pretended commitment, [or stating any other cause of detention according to the fact,] of which [a true copy is hereunto annexed ; or say] the following is a true copy : [set it out verbatim]* The said C. D. therefore prays that a habeas corpus may be issued to the said [S. S.,] and that [he or say the said X. L., or if his name is unknown, say : the said person, above mentioned and described,] may be discharged from his said imprisonment.

[Signed.]

[Date.]

But if the applicant is not imprisoned under legal process, then the application must be verified by an affidavit. The form of the application may be precisely the same as the above, except omitting the part which is between the two stars ; and annex to the application the following affidavit :

The above named C. D., being duly sworn, deposeth and saith, that the matters and things set forth in the above application, are true.

C. D.

Sworn to and subscribed before

me this — day of — A. D. —

G. H., Justice Peace,

SEC. III. THE ALLOWANCE OF THE WRIT.

The allowance is indorsed on the back of the application, thus :

(f) Id. 433, sec. 1.

Allowance of Habeas Corpus by Single Judge.

Let a writ of habeas corpus issue on the within application, returnable before me at — on the — day of — instant, at ten o'clock, A. M.

A. B., Judge, [&c.]

To the Clerk of — Com. Pleas.

Dated, [&c.]

If the writ be allowed in term time, the entry is made on the journal thus :

Allowance of Habeas Corpus in Term Time.

On application of C. D., it is ordered that a writ of habeas corpus issue to [E. F., of, &c., or describing the person as in the application,] commanding him to have the body of the said [C. D., or describing the person as in the application,] together with the day and cause of his caption and detention, before this Court on the — day of — instant, at 10 o'clock, A. M.

If the writ is allowed by a judge, the allowance is filed with the clerk of that court, of which the person allowing the writ, is judge.^s

SEC. IV. THE ISSUING AND FORM OF THE WRIT.

The application, with the indorsement of allowance by a judge, being filed with the clerk of the court, of which the person, allowing the writ, is judge, the clerk will immediately issue a writ.

There are two forms of writs prescribed by the statutes : one is issued where the detention is by a sheriff, deputy sheriff, coroner, jailor, constable or other like executive officer of courts, and is addressed to him ; and the other is issued when the detention is by any other person than such executive officer, and is addressed to the sheriffs of the state. The first mentioned writ is in the form following :

Form of writ of Habeas Corpus when the prisoner is in custody of an executive officer, such as the Sheriff, &c.

The State of Ohio, — county, ss.

To [E. F., or naming or describing the person as in the application :]

We command you, that the body of [C. D., or naming or describing the person as in the application,] in your custody detained, as it is said, together with the day and cause of his caption and detention, by whatsoever name the said [C. D., or person,] may be known or called, you safely have, before A. B., Judge, [&c., or, our Supreme Court, or, Court of Common Pleas,] [if is-

Form of the Writ.

sued by a Judge, add: or in case of his absence or disability, before some other judge of the same court,] at —, on the — day of —, instant, at 10 o'clock, in the morning, to do and receive all and singular those things which the said A. B., Judge, [*&c., or, our said Court of Common Pleas, or, Supreme Court,*] shall then and there consider of him in this behalf; and have you then there this writ.

Witness, F. C., Clerk of our said Court of Common Pleas, at — this — day of —, A. D. —.

F. C., Clerk.

But if the applicant is detained by some person, other than a sheriff, coroner, constable, or other like officer, the form of the writ is prescribed by statute, as follows:¹

Form of writ of Habeas Corpus when the prisoner is not in custody of an executive officer, such as the Sheriff, &c.

[SEAL.] The State of Ohio, — County, ss.

To the Sheriff of our several Counties, GREETING:

We command you, that the body of [*name or describe as in the application*] of — by [*name or describe as in the application,*] of — imprisoned, and restrained of his liberty, as it is said, you take and have before — a Judge of our — Court —, or, in case of his absence or disability, before some other Judge of the same Court, at — forthwith, to do and receive what our said Judge shall then and there consider concerning him in this behalf; and summon the said — then and there to appear before our said Judge, to show the cause of the taking and detaining of the said — and have you then there this writ, with your doings thereon. Witness — at — this — day of — in the year —.

In making out the writs, the person having the custody of the prisoner, may be designated by his name of office, if he have any, or by his own name; or if both such names are unknown, or uncertain, he may be described by an assumed appellation; and any one who is served with the writ, shall be deemed the person intended thereby.¹

So, the person to be produced, must be designated by his name if known; and if that is unknown, or uncertain, he may be described in any other way, so as to make known who is intended.¹

(f) 45 vol. Stat. 46.

(g) Ohio Stat. vol. 45, p. 46, § 2.

(i) 45 vol. Stat. 46, § 4.

(j) Id. § 5.

SEC. V. THE SERVICE, EXECUTION, AND RETURN TO THE WRIT.

Where the detention is by the sheriff, or other executive officer of the like kind, the writ is served by delivering the original to such sheriff or other officer, which may be done by any disinterested person.

When the detention is by other person than such officer, the writ may be served in any county, by any sheriff of the same, or any other county.^k

The officer or person upon whom either writ is served, must convey the person detained before the judge allowing the same, or, in case of his absence or disability, before some other judge of the same court, at the time specified in the writ or forthwith.^l

If the writ is issued by a court in session, and the court adjourns before its return, it may be returned before any judge of the same court.^m

The Act of 1847, requires the return, in all cases,ⁿ to state, in writing, plainly and unequivocally :

First, Whether the person making the return has, or has not, the party in his custody or power, or under restraint.

Second, If he has the party in his custody or power, or under restraint, he shall set forth, at large, the authority, and the true and whole cause of such imprisonment and restraint, with a copy of the writ, warrant, or other process, if any, upon which the party is detained.

Third, If he has had the party in his custody or power, or under restraint, and has transferred such custody or restraint to another, he shall state particularly, to whom, at what time, for what cause, and by what authority, such transfer was made.

The return is to be signed by the person making it, and sworn to, unless he be a sworn public officer, and makes the return in his official capacity.

Form of Bond.

The within named E. F. hereby certifies [to the within named A. B., or, to the within named Supreme Court, or, Court of Common Pleas,] that the within named C. D. was taken into the custody of the said E. F. on the — day of —, A. D. —, and is now detained in his custody, by virtue of, [*&c.*, here set forth, specifically, the cause of detention, such as legal process, guardianship under a will, or by appointment of court, right of parent, &c.

E. F.

Dated, &c.

Return — Prisoner sick, &c.

To the Judges of the Court [*or*, the Judge,] *within* named :

I hereby certify, that before the coming of this writ, by virtue of another

(k) 45 vol. Stat. 46, § 2
(l) Swan's Stat. 434. § 2.

(m) 45 vol. Stat. 46, § 3.
(n) 45 vol Stat. § 67.

Return, and proceedings thereafter.

writ before directed to me, a copy of which annexed to this writ, I transmit to you; C. D. within named was in the jail at —, and there lay sick and infirm, so that I cannot, for fear of his death, remove him. Therefore, I cannot have the body of the said C. D. at the day and place within contained.

J. S., Sheriff.

Another general Form.

To, [&c.] I hereby certify, that before the coming of this writ to me, C. D. within named, was taken in another place, and committed to the jail in the said county of —, by virtue of a certain other writ before to me directed, a copy of which annexed to this writ I transmit to you; nevertheless, I have the body of the said C. D. before you at the day and place within mentioned, as is to me within commanded.

J. S., Sheriff.

Return — Prisoner in custody on Mittimus.

To, [&c.] I hereby certify, that before the coming of this writ to me directed, C. D. in this writ named, was committed into my custody by a certain *mittimus* from J. S., a justice of the peace within and for the county of — aforesaid, the tenor of which said *mittimus* follows: [*Set out the mittimus verbatim*; and this is the cause of the taking and detention of the aforesaid C. D. under my custody. Yet the body of him the said C. D., I have before you as this writ requires.

W. C., Sheriff.

SEC. VI. PROCEEDINGS AFTER THE RETURN OF THE WRIT, WITH FORMS.

When a writ is returned before a single judge, during the session of the court, he may adjourn the case into court, for final decision;¹ and, upon good cause shown, the court or judge may continue the case for final hearing, making such order for the safe keeping of the person detained, as the case may require.^m

If it appears that the person detained is in custody under any warrant or commitment, in pursuance of law, the return will be considered as *prima facie* evidence of the cause of detention; but if the person, so detained, is restrained of his liberty by any alleged private authority, the return will be considered as a plea only, of the facts therein stated, and proof must be adduced to support it.

If the person is unlawfully detained, the court or judge will forthwith discharge him;ⁿ or, if detained in a legal manner, the court or judge, may commit or discharge him, or let him to bail, if the offence be bailable. A recognizance may in such case be taken, with one or more sufficient sureties, conditioned for

(l) 45 vol. Stat. 46, § 3.

(m) *Id.* Ib. § 4.

(n) Swan's Stat. 434, § 3.

Orders of Judge, &c.

the appearance of the prisoner at the next court where the offence is properly cognizable.^o The judge certifies his proceedings, together with the recognizance and the costs,^p forthwith to the proper court, where they are recorded, and may be reviewed by writ of error or certiorari, as in other cases.^q

If a person is set at large upon a habeas corpus, he cannot be imprisoned for the same offence, unless fresh process be obtained against him.^q

The statute is as follows :

"That any person who shall be set at large upon any habeas corpus, shall not be again imprisoned for the same offence, unless by the legal order or process of the court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause or offence. And if any person shall knowingly, contrary to this act, recommit or imprison, or cause to be re-committed or imprisoned, for the same offence, or pretended offence, any person so set at large, or shall knowingly aid or assist therein, he shall forfeit to the party aggrieved, five hundred dollars, any colorable pretence or variation in the warrant or commitment, notwithstanding."

The amount, and mode of payment of the costs, are prescribed by the statute.^r

Order for Discharge—Recommitment—or Recognizance taken, by Single Judge.

In the matter of C. D., upon Habeas Corpus:

Be it remembered, that on the — day of —, A. D. —, at —, in obedience to the command of a certain writ of habeas corpus, lately allowed by A. B., [one of the judges, &c.] on the application of C. D. of, &c., and issued from the clerk's office of the court of —, on the — day of — last past, E. F. of, &c., to whom the said writ was directed, appeared before me, having with him the body of the said C. D., together with said writ, and the day and cause of his, the said C. D.'s, caption and detention, as by said writ is commanded; and thereupon, the proofs and allegations of the parties being heard and fully understood, and it appearing that the said C. D. is illegally, [*or say legally, as the case may be,*] detained under the custody of the said E. F.: Therefore [it is ordered, that the said C. D. be, and he is hereby discharged out of the custody of the said E. F., and that he go hence thereof without day, &c.: Or,

If the party be recommitted, say: "It is ordered that the said C. D. be, and he hereby is recommitted to the custody of the said E. F." *If let to bail, say:* "It is ordered that the said C. D. be let to bail, upon entering into a recognizance, with security, to the amount of — dollars; and thereupon the said C. D., with E. F. and G. H. his securities, entered into such recognizance, in the said sum of — dollars, conditioned according to law."

(o) Id. Ib.

(p) 45 vol. Stat. 47, § 10.

(q) Swan's Stat. 435, § 6.

(r) See 45 vol. Stat. 47.

Orders of Court.

Order for Discharge, by the Court.

In the matter of C. D., upon Habeas Corpus :

This day E. F., to whom a writ of habeas corpus was directed on *Friday* last, upon the application of C. D. of, &c., appeared in open court, having with him the body of the said C. D., together with said writ, and the day and cause of his, the said C. D.'s, caption and detention, as by said writ is commanded ; and thereupon, the proofs and allegations of the parties being heard and fully understood,* and it appearing to the court that the said C. D. is illegally detained under the custody of the said E. F. : Therefore it is ordered, that the said C. D. be, and he hereby is discharged out of the custody of the said E. F., and that he go hence thereof without day, &c.

Order Remanding Prisoner.

*Proceed as in the last Precedent to the *, and then say :*] And it appearing to the court, that the said C. D. is lawfully detained under the custody of the said E. F., therefore it is ordered, that the said E. F. return the said C. D. to the said jail of —, under safe and secure conduct.

[*In some cases of guardians, parents, &c., no specific directions are given by the court. Thus :* “ And it appearing to the court, that the said C. D. is not unlawfully detained [*or is under no illegal restraint, &c.*] under the custody of the said E. F. : Therefore it is ordered, that the said E. F. go hence thereof without day,” &c.]

CHAPTER XLVII.

MISCELLANEOUS FORMS.

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| SECTION | I. JOURNAL ENTRY OF THE COMMENCEMENT OF THE TERM. |
| | II. FORMS RELATING TO THE GRAND JURY. |
| | III. PROBATE, &c. OF A WILL. |
| | IV. APPOINTMENT, &c. OF ADMINISTRATOR. |
| | V. ORDERS, &c. IN THE COURSE OF THE SETTLEMENT OF THE ESTATE OF DECEASED PERSONS. |
| | VI. FORMS RELATING TO THE SALE OF REAL ESTATE BY AN ADMINISTRATOR OR EXECUTOR. |
| | VII. ORDER FOR ADMINISTRATOR TO COMPLETE REAL CONTRACT OF INTESTATE. |
| | VIII. APPOINTMENT, &c. OF GUARDIANS. |
| | IX. LICENSES GRANTED, &c. |
| | X. NATURALIZATION OF ALIENS. |
| | XI. INSOLVENT DEBTORS. |
| | XII. JOURNAL ENTRY IN CASES OF BASTARDY. |
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In the preceding pages, the usual forms of journal entries, &c., in civil actions, have been given. There are some entries and forms, not directly relating to civil actions which did not come within the subjects of the preceding chapters, and which will be here noticed. Forms for all the various orders and proceedings of courts cannot, of course, be given; and if they could, it would be found impossible to so arrange and distinguish them, as to make them of practical use. No form book can be made a substitute for a knowledge of the general routine of the practice of our courts; and with that knowledge and a familiarity with the leading forms, no serious embarrassment can arise.

SEC. I. JOURNAL ENTRY OF THE COMMENCEMENT OF THE TERM.

At a Court of Common Pleas, in the ——— Judicial Circuit of the State of Ohio, began and held at the town of ———, within and for the county of ———, on

 Relating to Grand Jury.

the — day of —, in the year of our Lord one thousand eight hundred and — : Present,

A. B., President Judge.

C. D.,
E. F., } Associate Judges.
G. H., }

L. S., Clerk.

W. D., Sheriff.

SEC. II. FORMS RELATING TO THE GRAND JURY.

1. *Oath of Foreman of Grand Jury.*

You do solemnly [swear or affirm,] that, saving yourself and fellow Jurors, you, as Foreman of this grand inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service; the counsel of the state, your own and your fellows, you shall keep secret, unless called on in a court of justice to make disclosures; you shall present no person through malice, hatred or ill will, nor shall you leave any person unrepresented through fear, favor or affection, or for any reward or hope thereof; but in all your presentments, you shall present the truth, the whole truth and nothing but the truth, according to the best of your skill and understanding; and this you do, [as you will answer to God at the great day, or under the pains and penalties of perjury.

2. *The like to the other Grand Jurors.*

You, and each of you, do solemnly [swear or affirm,] that the same oath which A. B., your foreman, hath now taken, before you, on his part, you, and each of you, shall well and truly observe and keep on your respective parts: and this you do, [as you will answer to God at the great day, or under the pains and penalties of perjury.

3. *Journal Entry of Empanneling Grand Jury, and with Talesmen added.*

The Jurors of the Grand Jury being called, came, to wit, A. B., [&c.] good and lawful men: The Court appointed the said A. B. foreman; and the said Jurors, being duly empaneled, sworn and charged, retire to their room to deliberate, attended by an officer of the Court.

Probate of a Will, &c.

The like with Talesmen added.

The Jurors of the Grand Jury, being called, some of them came, to wit, A. B., [&c. ;] and because the residue of said Jurors of that Jury do not appear, others from among the bystanders are, by the Sheriff of said county, at the command of the Court, elected anew, to wit, C. D., [&c.,] good and lawful men, whose names are annexed to the panel, according to the form of the statute in such case made and provided. The Court appoint the said A. B. foreman, and the said Jurors being duly empaneled, sworn and charged, retire to their room to deliberate, attended by an officer of the Court.

4. *Indictments presented by Grand Jury.*

This day the Grand Jury appeared at the bar of the Court, and presented their bill of indictment against A. B. for ——. Indorsed, "A true Bill. C. D., Foreman : " Also their other bill of indictment, against E. F. for ——. Indorsed, [&c.] And not having finished the business before them, they retired again to deliberate, [or, having finished the business before them, they were discharged from further attendance as Grand Jurors at the present term of this Court.]

SEC. III. PROBATE, &c. OF A WILL.

1. *Journal Entry of Proof of a Will, &c., and Form of Testimony as reduced to writing.*

In the matter of A. B.'s Will.

The last will and testament of A. B., late of, [&c.,] in said county deceased, was this day produced in Court by Mr. O., attorney for the executor in said will named, and J. N. and J. S., the subscribing witnesses to said will appeared, and in open Court, on oath, testified to the due execution of said will; which testimony was reduced to writing, and by them respectively subscribed and filed with said will; and it appearing to the Court by said testimony, that said will was duly attested and executed, and that the said testator, at the time of executing the same, was of full age and of sound mind and memory, and not under any restraint, it is ordered by the Court, that said will and testimony be recorded.* Whereupon C. S., the executor in said will named, appeared in Court and signified his acceptance of the trust of executing said will, it is therefore further ordered, that letters testamentary be issued to him on his giving bonds in the the sum of — dollars, with — and — as sureties, con-

 Probate of a Will, &c.

ditioned according to law. The Court appoint T. S. and A. S. appraisers of the personal estate of the said testator.

The testimony may be in the form following :

The State of Ohio, — County, ss.

We, — and —, being duly sworn in open Court this — day of — A. D. —, depose and say, that we were present at the execution of the last will and testament of —, hereunto annexed ; that we saw the said testator subscribe said will, and heard him publish and declare the same to be his last will and testament, and that the said testator, at the time of executing the same, was of full age, and of sound mind and memory, and not under any restraint ; and that we signed the same as witnesses at his request, and in his presence.

[Signed.]

2. *The like, Administration Granted with the Will Annexed.*

In the matter of A. B.'s Will.

The last will and testament of A. B., late of, [&c.,] in said county, was this day produced in Court by Mr. O., attorney for —, and J. N. and J. S., the subscribing witnesses to said will, appeared, [&c., *proceed as in the last precedent to the *, and then say,*] and thereupon C. S., the executor in said will named, signifying his refusal to accept the trust of executing said will, [*or there being no executor named in said will, as the case may be,*] and the certificate of C. B., widow of the said A. B., being produced to the Court, by which it appears that she declines taking letters of administration on the estate of her deceased husband, and requests the appointment of D. C., it is therefore further ordered, that the said D. C. be appointed administrator, with the will annexed, on the estate of the said A. B., and that T. S. and A. S. appraise the personal property of the said testator ; and it is further ordered, that the said D. C. give bonds in the sum of — dollars, with C. D. and E. F. as sureties, conditioned according to law ; whereupon the said D. C. appeared in open Court and accepted said appointment, and gave bonds accordingly.

3. *Order for Commission to Issue to prove Will, and Form of Commission.*

In the matter of A. C.'s Will.

The last will and testament of A. B., late of — in said county, deceased, was this day produced in Court by Mr. O., attorney for the executor in said will named, and it appearing to the satisfaction of the Court, that J. N., one of the subscribing witnesses to said will, resides out of the jurisdiction of this

 Probate of a Will, &c.

Court, at, [&c., or is infirm and unable to attend Court, *as the case may be,*] it is ordered, that a commission issue, with the said will annexed, to take the deposition of the said J. N., touching the due execution of said will, to be directed to J. J., P. W. and J. W., any two of whom may execute the same, according to the statute in such case made and provided.

Form of the Commission.

[SEAL.] The State of Ohio,

To J. J., P. W. and J. W., of, [&c.,] Greeting :

Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give to you, or any two of you, full power and authority to examine and take the deposition of J. N., one of the subscribing witnesses to the will of A. C., hereto annexed, late of, [&c.,] and therefore we command you, or any two of you, that at certain days and places to be appointed by you, or any two of you, [*directing notice if the order require it,*] you cause the said J. N. to be brought before you, or any two of you, and then and there examine him on his corporal oath, or affirmation, first taken before you, or any two of you, touching the due execution of the said will of the said A. C., and that you reduce such examination to writing, and return the same, together with this writ and the said will of the said A. C. thereto annexed, closed up under your seals, or the seals of any two of you, into our Court of Common Pleas, with all convenient speed.

Witness T. C., Clerk of our said Court of Common Pleas, at C ———, this ——— day of ———, A. D. ———.

T. C., Clerk.

4. *Journal Entry of Proof of Wills, &c. on Commission.*

In the matter of A. C.'s Will.

The commission heretofore issued from this Court, with the said will of the said A. C. annexed, to take the deposition of J. N., one of the subscribing witnesses thereto, was this day produced in Court, and filed by Mr. O., attorney for the executor in said will named, and it appearing to the satisfaction of the Court, as well by the said deposition of the said J. N. as also by the testimony of J. S., another subscribing witness to the said will, taken in open Court and reduced to writing, and signed by the said J. S., and also filed with the said will, that the said will was duly attested and executed, and that the said testator, at the time of executing the same, was of full age and of sound mind and memory, and not under any restraint, it is ordered, [&c., *conclude as in the last precedent of journal entry.*]

 Will from another State — Bond and Letters Testamentary.

5. *Will from another State ordered to be Recorded.*

An authenticated copy of the last will and testament of A. B., &c. late of, [&c.,] in the county of, [&c.,] and state of, [&c.,] was this day produced in Court by, [&c.,] and it appearing to the satisfaction of the Court that the said will has been proved in said state of, [&c.,] according to the laws of that state, and that said will has relation to property within the said county of — : Therefore, on motion, it is ordered by the Court, that the said authenticated copy thereof be recorded in the records of wills for said county of —.

6. *Form of the Bond of an Executor.*

Know all men by these presents, that we, A. B. as principal, and C. D. and E. F. as sureties, of the county of —, Ohio, are held and bound to the State of Ohio in the sum of — dollars; for the payment of which we jointly and severally bind ourselves. Sealed and dated this — day of —, A. D. —.

The condition of the above obligation is such that, if the said A. B., executor of the last will and testament of G. G., late of said county, deceased, shall make and return to the Court of Common Pleas of said county, within three months, a true inventory of all the moneys, goods, chattels, rights and credits of said testator which are by law to be administered, and which shall have come to his possession or knowledge; and also, if required by the court, an inventory of the real estate of the deceased; and shall administer according to law, and to the will of the testator, all his goods, chattels, rights and credits, and the proceeds of all his real estate, that may be sold for the payment of his debts or legacies, which shall at any time come to the possession of said executor, or to the possession of any other person for him; and shall also render, upon oath, a just and true account of his administration within eighteen months, and at any other times when required by the court or the law: then this obligation to be void, otherwise in full force.

[SEAL.]

[SEAL.]

[SEAL.]

Attest: C. C., Clerk.

7. *Form of Letters Testamentary.*

The State of Ohio, — county, ss.

To all to whom these presents shall come — Greeting:

Know ye, that the last will and testament of G. G., late of — county, in

 Appointment of Administrator — His Bond.

the State of Ohio, deceased, having been duly proved before the Court of Common Pleas of said county, and by said court allowed and admitted to record; the said court doth hereby grant unto L. L., executor named in said will, full power and authority to administer according to law and to the said will, all and singular the goods, chattels, moneys, rights and credits of said deceased, and also the proceeds of all the real estate of said deceased which he may be authorized to sell for the payment of the debts or legacies of said deceased; to collect all the debts due to, and pay those due from the estate of said deceased, so far as its means will extend and the law require, and to do all things which may be lawfully done in the premises, to effect the just and speedy settlement of said estate.

In testimony whereof, the seal of said court is hereunto affixed. Witness,

[SEAL.] C. C., clerk of said court, this — day of —, A. D. —.

C. C., Clerk.

 SEC. IV. APPOINTMENT, ETC., OF ADMINISTRATOR.

Appointment of Widow, as Administratrix.

In the matter of A. B.'s Estate :

On motion, the court appoint C. B., widow of A. B., late of, [&c.,] in said county, deceased, administratrix on the estate of her deceased husband, and J. S. and J. N., appraisers.

Ordered, that said administratrix give bonds in the sum of — dollars, with C. D. and E. F. as sureties, conditioned according to law.

Appointment where Widow Declines.

In the matter of A. B.'s Estate :

The certificate of C. B., widow of A. B., late of, [&c.,] in said county, deceased, was this day produced in court, by which it appears that she declines taking letters of administration on the estate of her deceased husband, and requests the appointment of D. E.; and thereupon the court appoint the said D. E. administrator on said estate, and J. S. and J. N., appraisers.

Ordered, that said administrator give bonds in the sum of — dollars, with C. D. and E. F. as sureties, conditioned according to law; and thereupon the said D. E. appeared in open court and accepted said appointment, and gave bonds accordingly.

Form of Administrator's Bond.

Know all men by these presents, that we, A. B. as principal, and C. D. and E. F. as sureties, of the county of —, are held and bound unto the State of Ohio, in the sum of — dollars, for the payment of which we do jointly

Letters of Administration — Further time to collect assets.

and severally bind ourselves. Sealed with our seals, and dated the — day of —, A. D. —.

The condition of the above obligation is such, that if the above named A. B., administrator of the estate of J. S., late of the county and State aforesaid, deceased, shall faithfully make and return into court, on oath, within three months, a true inventory of all the moneys, goods, chattels, rights and credits of the deceased, which have or shall come to his possession or knowledge; and also, if required by the court, an inventory of the real estate of the deceased; and administer, according to law, all the moneys, goods, chattels, rights and credits of the deceased, and the proceeds of all his real estate that may be sold for the payment of his debts, which shall at any time come to the possession of the administrator, or to the possession of any other person for him; and render, upon oath, a true account of his administration, within eighteen months, and at any other times, when required by the court or the law; and pay any balance remaining in his hands, upon the settlement of his accounts, to such persons as the court or law shall direct; and deliver the letters of administration into court, in case any will of the deceased shall be hereafter duly proved and allowed, then this obligation to be void; otherwise to remain in full force.

Form of Letters of Administration.

The State of Ohio, — County, ss.

To all to whom these presents shall come, Greeting:

Know ye, that the Court of Common Pleas, within and for said county, doth hereby grant the administration of the estate of G. G., late of — county, in the State of Ohio, deceased, unto L. L., who is hereby fully empowered and authorized to administer all and singular the goods, chattels, moneys, rights, and credits of said deceased, and also the proceeds of all the real estate of said deceased, which he may hereafter be authorized to sell; to collect all the debts due to, and pay those due from, said estate, so far as its means will extend and the law require, and to do all things which may be lawfully done in the premises, to effect the just and speedy settlement of said estate.

In testimony whereof, the seal of said court is hereunto affixed.

Witness, C. C., clerk of said court, this — day of —, A. D. —.

C. C., Clerk.

SEC. V. ORDERS, ETC., IN THE COURSE OF THE SETTLEMENT OF ESTATES.

Further time allowed for the collection of Assets.

On motion and affidavit filed, It is ordered, that A. B., [administrator or ex-

Orders, &c., in the course of the settlement of Estates.

ecutor] of the estate of G. G., deceased, have the further time of one year to collect the assets of said estate.^a

Representation of the probable insolvency of the Estate.^b

It appearing to the court from the representation of A. B., executor [or administrator] of the estate of G. G., deceased, that the real and personal estate of the deceased will, probably, be insufficient for the payment of his debts; It is ordered, that [L. M. and R. S. be, and they are hereby appointed commissioners to, *or say*, the said administrator (or executor,)] receive, examine, audit and return to this court, a list of the claims against said estate as provided by law.

Order for the payment of a Dividend on an insolvent Estate.

In the matter of G. G.'s estate.

The court order A. B., the administrator of said estate, to pay to the creditors of said estate, on the claims audited, allowed, and reported to the court, [by the commissioners appointed for that purpose, *or say* by said administrator,] the sum of — cents on the dollar.

Order for a Citation against an Administrator or Guardian.

On motion of A. B., by Mr. O., his attorney, It is ordered, that a citation issue against J. S., administrator on the estate of A. S., [or, guardian of C. S., &c.,] to show cause, if any there be, on the first day of the next term, why he neglects to make settlement of his administration on said estate, [or, of his accounts as guardian of the said C. D., &c.]

Form of Citation.

'The State of Ohio, — County, ss.

To the Sheriff of said County, Greeting :

We command you that you make known to J. S., administrator on the estate of A. S., deceased, [or, guardian of C. S., &c.,] that he be before the judges of our Court of Common Pleas within and for the said county of —, on the first day of their next term, at the court house in said county, to show

(a) This application is founded upon an affidavit, and the statute prescribes its general form : Swan's Stat. 349, § 61. It may be as follows :

The State of Ohio, — County, ss.

A. B., executor [or, administrator,] of the estate of G. G., deceased, being duly sworn, deposeseth and saith, that all the money he has collected belonging to said estate, has been applied in good faith, to the payment of claims against

said estate, except the sum of — dollars, and that there is but — dollars in his hands, applicable to the payment of the debts of the deceased; that he has used due diligence to collect the assets, and to pay the debts of said estate, but that [here state the grounds of the application.]

[Signed.]

Sworn to, [&c.]

(b) Swan's Stat. 376, § 201; 379, § 214.

Reference of Accounts—Settlement—Petition for sale of Real Estate.

cause, if any there be, why he neglects to make settlement of his administration on said estate, [or of his accounts as guardian of the said C. S., &c.]

Herein fail not, but of this writ and your service make due return.

Witness, A. C., clerk of our said court, at, &c., this — day of — A. D. —.
A. C., Clerk.

Reference of Accounts of Administrator to a Master, &c.

In the matter of N. G.'s estate.

The court having this day inspected the report of the Special Master Commissioner to whom the accounts of A. B., administrator on the estate of the said N. G., were referred, at the last term, It is thereupon ordered, that the said A. B. do appear personally before said master, at his office in —, at nine o'clock, A. M., on the — day of —, A. D. —, and then and there submit to an examination touching said accounts; and that he then and there produce before the said master, such books, papers, accounts and other documents, as may be required by said master; and that he continue to appear before said master from day to day, until discharged by him. And the said master is ordered to report his proceedings in the premises to this court on the first day of their next term; to which time this matter is continued.

Journal Entry of final settlement of Administrators' Accounts.

G. B., administrator on the estate of T. B., deceased, this day settled his accounts with the court, and a balance is found in his hands due the estate of the said T. B. of — dollars, which is ordered to be distributed according to law.

SEC. VI. FORMS RELATING TO THE SALE OF REAL ESTATE BY AN ADMINISTRATOR OR EXECUTOR.

The Form of the Petition and Affidavit.

To the Court of Common Pleas of the county of —, Ohio:

Your petitioner, A. B., administrator of the estate of G. G., deceased, respectfully represents, that the total value of the personal estate and effects of said decedent, is, as near as can be ascertained, — dollars; which will more fully appear by the certificate of the clerk of this court herewith filed, marked (A); but not more than — dollars can be realized therefrom. That the amount of debts owing by the deceased, as nearly as they can be now ascertained, amount to — dollars; and the amount of the charges of administration to — dollars. The personal estate and effects are insufficient to pay said debts.

The said decedent died seized in fee simple of the following real estate,

Petition of Administrator to sell Real Estate.

situate in [*here describe the real estate to be sold. If it be an equitable estate, describe the lands, the nature of the title held by the decedent, the name of the person or persons owning the legal title, and the amount of the purchase money, if any, due from the decedent, and the name of the person to whom it is due. If the value of the real estate was returned in the inventory by the appraisers of the personal estate, state that fact, and the amount for which it was appraised.*]

The said decedent died, leaving L. G., his widow, who is entitled to dower in said premises. [*If the widow takes, in lieu of dower, under the will, or there be no widow, or her dower has been otherwise satisfied, so state; but if she be living, she may be made a party to the petition.*]

The following persons are the [*heirs, or say, devisees, as the case may be,*] having the next estate of inheritance in the premises above described, from the said decedent, namely: [*Here name the heirs or persons having the next estate of inheritance in the premises from the deceased. If any of the parties who ought to be made defendants, are unknown, or their residence unknown, or if they reside out of the State, or are infants, here state it. If there are mortgage, judgment or equitable liens on the lands, it will be found safest and best to state their general nature, and make the owners parties defendants to the petition, and ask that they may state the nature, extent, and amount of their claim and lien. By so doing, the court will, by adjusting and determining the extent and amount, &c., of their claims and liens, save the executor or administrator from the responsibility of adjusting them himself.*]

Your petitioner prays that the said widow, and the said persons above mentioned and described, having the next estate of inheritance in said premises, from said decedent, together with [*here name the persons having the liens; and if the petition is for the sale of an equitable estate, here name the owner of the legal estate, and the person to whom any purchase money may be due from the decedent,*] be made parties defendants to this petition; that the dower of the said L. G. may be set off, the several rights, liens, &c., of the above named defendants adjusted, &c.; and that your petitioner may be ordered to sell said real estate, &c., and such other relief, &c.

By S. M., Sol'r for Pet'r.

Exhibit (A) referred to in the above Petition.

The State of Ohio, — county, ss.

I do hereby certify, that the appraised value of the personal estate and effects of the estate of G. G., deceased, which includes the value of the debts due to the estate, is — dollars — cents, as appears from the inventory filed in my office, January 10, 1851.

[Signed without seal,]

A. R., Clerk of Com. Pleas — county.

Proceedings by Administrators to sell Real Estate.

Form of Affidavit to accompany the petition, when persons are made defendants whose names or whose place of residence are unknown, &c.

The State of Ohio, — county, ss.

I, A. B., administrator of the estate of G. G., deceased, petitioner named in the within petition, do make solemn oath that the heirs and legal representatives of R. G., deceased, in the within petition mentioned, are unknown to me; the said G. G., named in said petition, resides out of this State, as I verily believe; and the residence of the said H. G., named in said petition, is unknown to me.

[Signed,]

A. B.

Sworn to and subscribed this — day of —, A. D. —, before me.

Form of Notice to the Defendants.

To — :

You are hereby informed, that I have filed a petition as administrator of the estate of G. G., deceased, in the Court of Com. Pleas of — county, for the sale, &c., of the real estate of said decedent; and shall, in pursuance of the prayer of said petition, on the first day of the — term, 1851, of said court, to wit: on the — day of —, 1851, or as soon thereafter as counsel can be heard, ask for an order for the assignment of the dower of the widow of G. G., in, and for the sale of the following real estate, of which the said G. G. died seized, or so much thereof as may be necessary to pay his debts, to wit: [here briefly describe the property proposed to be sold, as thus:] the homestead and farm upon which said G. G. resided at the time of his decease, being part of section 4, township 5, range 14, U. S., Military District, situate in — county, and containing sixty acres, more or less.]

[Signed,]

A. B., Adm'r of C. D., dec'd.

Dated, [&c.]

Form of Affidavit of the service of Notice of the Petition.

The State of Ohio, — county, ss.

I, R. S., do make solemn oath, that on the — day of —, A. D. —, I served the within named R. B. with a notice, of which the within is a true copy.

[Signed,]

R. S.

Sworn to and subscribed before me, this — day of —, A. D. —.

Proceedings by Administrators to sell Real Estate.

Form of written consent of the Defendants to the Sale.

A. B., administrator of
G. G., deceased,
v.
E. G., G. G., H. G. and
L. his wife, and J. D. } ——— Com. Pleas. Petition to sell Land.

And the said L. G., widow of said G. G., deceased, and the said G. G., and H. G. and L. his wife, in their own proper persons, and the said J. D., by his guardian, R. L., come and waive process, and appear to said petition, and hereby consent to the sale, &c., of the premises in the petition described, as prayed.

[Signed, &c.]

Form of Notice for Publication.

A. B., administrator
of G. G., dec'd,
v.
G. G., H. G., and
J. D. } ——— Com. Pleas. Petition to sell Land.

To G. G., H. G., and the unknown heirs and legal representatives of J. D., who are heirs and legal representatives of G. G., deceased:

You are hereby informed, that on the — day of —, 1851, said administrator filed his petition in the Court of Common Pleas of — county, Ohio, the object and prayer of which petition is to obtain an order, &c., at the next term of said court, for the assignment of the dower of L. G., the widow of said G. G., deceased, in, and for the sale of the following real estate, (of which the said G. G. died seized,) or so much thereof as may be necessary to pay the debts of said decedent, to wit: [*here briefly describe the property proposed to be sold, as thus:* the homestead and farm upon which the said G. G. resided at the time of his decease, being part of section 4, township 5, range 14, United States Military District, in — county, and containing sixty acres, more or less.]

[Signed,]

A. B., Adm'r of G. G., dec'd.

Dated, [&c.]

 To the Printer — Publish four weeks.

Form of Affidavit proving publication of Notice.

The State of Ohio, — county, ss.

R. H., being duly sworn, deposeth and saith, that a notice, of which the annexed is a true copy, was published for four weeks, successively, immediately previous to the — day of —, 18—, in the —, a newspaper of general circulation in the county of —, where G. G., deceased, last dwelt.

[Signed,]

R. H.

Sworn to and subscribed before me, this, [&c.]

Proceedings by Administrators to sell Real Estate.

Order of Appraisement and Assignment of Dower.

A. B., Adm'r of the Estate of G. G., deceased, v L. G., et. al.	}	Petition for sale of Real Estate.
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The court being satisfied, that it is necessary to sell the real estate of the said G. G., deceased, to pay his debts, and that the defendants herein have been duly notified of the pendency of this petition as prescribed by law, It is ordered, that S. T., U. V. and W. N., judicious and disinterested men of the vicinity,* set off and assign to L. G., the widow of said G. G., deceased, her dower in the premises described in the petition, by metes and bounds in [each or one or more of] said tract, or tracts of land, or specially of the rents and profits, if no division can be made; and also appraise said premises, subject to the encumbrance of dower so assigned, and make return of their proceedings herein [forthwith.]

Order of Appraisement and Sale when no Dower is to be assigned.

Follow the preceding form to the *, and then proceed as follows:— Appraise said premises as provided by law, and that the said A. B., as said administrator, proceed, after such appraisement, to sell said premises in the petition described, according to law, and upon the following terms, to wit: one third [&c., as the court may direct. See order of sale, post. 1267, 1268.

The Certificate of oath of Appraisers.

The State of Ohio, — County, ss.

On the — day of —, 18 —, before me personally appeared A. D., A. C. and A. R., within named, and made solemn oath that they would, upon actual view, honestly and impartially assign dower and appraise the real estate of G. G., deceased, in pursuance of the order of the Court of Common Pleas of — county, in the case of A. B., administrator, vs. R. G., and others.

G. H., Justice of the Peace of said county.

[Date.]

Form of Appraisement when there is but one Tract, and Dower is set off therein.

A. B., Adm'r of C. D., v. G. B., et. al.	}	——— Com. Pleas. Petition to sell land.
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In obedience to the order of court in this case, after being first duly sworn, [or, affirmed,] and upon actual view of the premises, in the said petition described, we, the undersigned appraisers, do set off and assign to M. D., the

 Proceedings by Administrators to sell Real Estate.

widow of said C. D., deceased, for her dower estate in the real estate mentioned and described in said petition, so much of said lands as is contained within the following bounds, to wit: [*Here give such a description of the premises set off for dower, that a person could ascertain from the description what lands are set off.*] *We do estimate the real estate described in said petition, subject to, and encumbered by said dower, at — dollars.

[Signed, &c.]

Form of Appraisement when there is more than one Tract, and Dower for all the Tracts is set off in one Tract.

*Follow the preceding form to the *, and from that point proceed as follows:*] — And we do estimate the just value of said real estate described in said petition as follows:

The tract of — acres, more or less, first described in said petition, in which the above dower estate is set off, and subject to, and encumbered by said dower estate, at — dollars. The tract of — acres, more or less, secondly described in said petition, which becomes, by the assignment of dower as aforesaid, unencumbered, at — dollars, [*&c., so proceeding to estimate each tract.*]

[Signed, &c.]

Form of Appraisement when Dower cannot be set off, and rents are set off in its place.

A. B., Adm'r of C. D., v. G. B., et. al.	}	——— Com. Pleas. Petition to sell land.
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In obedience to the order of the court in this case, and after being first duly sworn, [*or, affirmed,*] and upon actual view of the premises in the said petition described, we, the undersigned appraisers, do find that said premises are entire, and that no division thereof can be made by metes and bounds, and do therefore set off and assign to said M. B., as and for her dower therein, the sum of — dollars, yearly during her life, being one third part of the clear annual rents, issues and profits of said premises, and we do estimate the just value of said real estate, subject to, and encumbered by the payment of said sum, yearly, at — dollars.

[Signed, &c.]

Order confirming Dower, and ordering Sale.

Title of the case as above.] The appraisers, appointed herein to assign dower to L. G., and to appraise the premises in the petition set forth, having performed that duty and reported their proceedings herein, the same is hereby approved and confirmed; [*and it is ordered that said L. G. hold in severalty as and for her dower during her natural life, the premises so set off and assigned to her; [or if the dower is assigned specially of the rents say, and*

 Proceedings by Administrators to sell Real Estate.

it is ordered, that the premises, described in said petition, and in which the said L. G. was entitled to dower be, and the same are hereby charged and encumbered with, and a lien thereon hereby declared, into whosoever hands the same may pass by deed, devise, descent or otherwise, for the payment to the said L. G. and her assigns, on the *fifth* day of *February*, A. D., 1860, and yearly and each and every year thereafter on the *fifth* day of *February*, during the natural life of the said L. G., of the sum of — dollars; the first payment to be made on the *fifth* day of *February* A. D. 1860, and a ratable proportion of said sum to be paid to her representatives for the year in which she may die. And it is further ordered that said charge upon said premises shall be stated and set forth in the deeds which the said A. B. may execute to purchasers by virtue of any order of the Court in this cause.] And it is further ordered, that said A. B., as said administrator, proceed to advertise and sell said real estate in the petition described, according to law, subject to the charge and encumbrance aforesaid, and upon the following terms to wit: one-third of the purchase money in hand, on the day of sale, and the residue thereof in one and two years thereafter, with interest from the day of sale, to be secured by mortgage on said premises. And it is further ordered, that the said A. B. report his proceedings herein, at our next term, to which time this cause is continued.

Form of Notice of Sale of Real Estate.

Sale of Real Estate by order of Court.

On the — day of —, 18 —, 3 o'clock in the afternoon, at the door of the court house, in the town of —, [or naming any other place where the court have ordered the sale,] will be sold to the highest bidder, the following real estate, as the property of C. D., deceased, to wit: [Here describe the property, and say, subject to the dower of the widow, if such be the fact.] Appraised at \$—. Terms of sale: [Here state how the payments are to be made.] •

A. B. Adm'r of C. D., deceased.

[Date.]

Form of Report of Sale.

A. B., Adm'r of C. D., deceased. vs. E. D., et. al.	}	——— Com. Pleas. Petition to sell land.
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In pursuance of an order of sale, made at the — term, 18 —, of said Court, I gave notice of sale in due form of law, and at the time and place mentioned in said notices for said sale, to wit: at —, on the — day of —, 18 —, I offered said property at public auction, and P. P. having bid therefor — dollars, and he being the highest and best bidder, and the same

Proceedings by Administrators to sell Real Estate.

being more than two-thirds of the appraised value thereof, I struck off and sold the same to him for that sum.

A. B., Adm'r of C. D., deceased.

Fees :

Publication of notice, \$——.

[Date.]

Order confirming the Sale.

Title of case as above.]

The said A. B., having made return of the sale of the premises in the petition described; and the court having carefully examined his proceedings, and the sale by him made, and being satisfied that the same has, in all respects, been legally made, do confirm the same; and the said administrator is ordered, to execute a deed to the purchaser, [subject to the charge,] and he securing the deferred payments, as provided by our order heretofore made in this cause.

And the court do find that there were at the time of the decease of the said G. G., the following liens upon said premises, and for the following sums, and in favor of the following persons, and which are entitled to priority of payment, and in the following order, to wit :

I. A judgment rendered at, [&c.,] in favor of, [&c.,] against, [&c.,] upon which is now due, [&c.]

II. A mortgage upon said premises, executed by said A. B. to, [&c.,] and recorded on, [&c.,] upon which is now due the sum of —— dollars.

It is therefore further ordered, that said administrator apply the money arising from said sale, or so much thereof as may be necessary, after first paying the costs, charges of administration, and expenses incident to the sale, to the payment of said liens, and in the order above stated.

Form of Administrator's Deed.

To all to whom these presents shall come, Greeting:

Whereas, at the —— term, A. D. ——, of the Court of Common Pleas of —— county, Ohio, in certain proceedings upon petition for the sale of real estate, wherein A. B., as administrator of G. G., deceased, was petitioner, and L. G., [&c.,] were defendants, the said administrator was ordered to sell at public auction [and upon the terms, and subject to the charge hereinafter mentioned,] the following described real estate of said G. G., deceased, situate in said county, to wit: [*describe the premises.*] And whereas, in the proceedings aforesaid, the said court assigned and set off to L. G., the widow of said G. G., deceased, [dower in said premises, or say, as of the rents and profits of said premises, and as, and for her dower, the sum of —— dollars.

And it was ordered by said court, that said premises should be charged and encumbered with, and a lien thereon was declared, into whosoever hands the same might pass, [&c., reciting the preceding order as to terms, amount, &c. See ante, 1268.

Order for Administrator to complete Real Contract.

And whereas, the said administrator, having duly advertised said real estate, did, on, [&c.,] sell the same at public auction, [and upon the terms herein above mentioned,] to L. M., for the sum of — dollars; and which sale was at the — term, A. D. —, of said court confirmed, and said administrator ordered to execute a deed to said L. M., for said premises, subject to said dower, [or say, charged with the payments aforesaid to said L. G.]

Now therefore, I, the said A. B., as administrator as aforesaid, in consideration of said sum of —, paid, and secured to be paid, by said L. M., and by virtue of the proceedings aforesaid, do by these presents grant, bargain, sell, and convey to said L. M., his heirs and assigns, forever, the premises above described, with the appurtenances.

To have and to hold said premises, with the appurtenances, unto the said L. M., his heirs, and assigns forever, subject, nevertheless, [to the dower estate aforesaid, or say, and hereby expressly charged and encumbered in the hands of said L. M., his heirs and assigns, and into whosoever hands the same may pass, by deed, descent, or otherwise, to the charge, encumbrance and lien aforesaid, in the manner, and to the extent, and as provided by the said order of said court.]

In witness whereof, I, as administrator of said G. G., deceased, have hereto set my hand and seal, this — day of —, A. D. —.

A. B., [SEAL.]
Adm'r of G. G.

Signed, sealed, and delivered, }
in presence of, }

The State of Ohio, — County, ss.

Be it remembered, that on the — day of —, A. D. —, before me, a justice of the peace, in and for said county, personally appeared A. B., above named, and acknowledged the foregoing conveyance to be his voluntary act and deed, as administrator of C. D., deceased.

G. H., Justice of the Peace.

SEC. VII. ORDER FOR ADMINISTRATOR TO COMPLETE REAL CONTRACT OF INTEREST.^a

This day came the petitioner, and showed to the satisfaction of the court, that the contract in the said petition set forth, was duly made, and has been fully complied with on the part of the said D. W., the purchaser of the lands in the said petition described, and that due notice of the pendency of this petition, and the demand thereof, has been given to the said heirs at law of the said C. D.: Therefore, It is ordered, that the said A. B., for and in behalf of the said heirs of the said C. D., make, execute and deliver to the said D. W., a deed in fee simple for the lands and tenements in said petition described, according to the statute in such case made and provided.

(a) Swan's Stat. 213.

Appointment, &c., of Guardians.

SEC. VIII. APPOINTMENT, &c. OF GUARDIANS.

Appointment of Guardian by choice of Orphan.

In the matter of A. B., an Orphan.

This day appeared in Court A. B., aged — years, on the — day of — A. D. —, orphan son of C. B., late of, [&c.,] in said county, deceased, and in open Court made choice of O. P. for his guardian, and the Court approving the choice, it is ordered, that said guardian give bond in the sum of — dollars, with J. S. and L. M. as sureties, conditioned according to law; and thereupon the said O. P. accepted said appointment and gave bond accordingly.

Appointment of Guardian by the Court.

In the matter of A. B., an Orphan.

On motion, it is ordered, that O. P. be appointed guardian to A. B., aged, [&c., as in preceding form.

Form of Bond of Guardian.

Know all men by these presents, that we, A. B., [&c.,] of the county of —, and state of Ohio, are held and bound unto the state of Ohio, in the sum of — dollars, for the payment of which we jointly and severally bind ourselves.

Scaled with our seals, and dated the — day of — A. D. —.

The condition of this obligation is such, that if the above named A. B., guardian for C. B., [&c.,] of the county and state aforesaid, minor and orphan of A. C., late of the county and state aforesaid, deceased, shall discharge with fidelity the trust reposed in him as guardian, as aforesaid, and shall render an accurate statement of his transactions as such guardian, with a just account of the profits arising and accruing from the real or personal estate of his ward, and shall deliver up the same to the Court when thereunto required, then the above obligation to be void, otherwise to remain in full force and virtue in law.

Form of Guardian's Letters.

The State of Ohio, — County, ss.

To all persons to whom these presents shall come, Greeting :

Know ye, that the Court of Common Pleas within and for said county, doth hereby grant the guardianship of D. G., aged — years, on, [&c.,] a minor child of G. G., late of said county, deceased, unto M. M., of, [&c.,] who is hereby fully empowered and authorised to do and perform all and singular the

Licenses.

duties appertaining to said appointment; the said guardian having given bond according to law, and in all respects complied with the requisitions of the statutes, in such cases made and provided.

In testimony whereof, the seal of said Court is hereunto affixed. Witness C. D. Clerk of said Court, this — day of — 18 —.

C. D., Clerk.

SEC. II. LICENSES GRANTED, &c.

To Clergyman.

On motion, and it appearing to the Court that the Reverend W. S. is a regularly ordained minister of the gospel, of the denomination commonly called —, it is ordered, that he be licensed to solemnize marriages within the state of Ohio so long as he continues to be such a minister.

Form of License to Marry.

The State of Ohio,

[SEAL.]

To any person lawfully authorized to solemnize marriages in the county of — Greeting :

These presents shall be your sufficient warrant to join in matrimony A. B. and C. D.; certifying the same within three months thereafter, to the Clerk of the Court of Common Pleas of said county of —, pursuant to the statute in such case made and provided.

In testimony whereof, I, A. C., Clerk of the said Court of Common Pleas, have hereunto subscribed my name, and affixed the seal of said Court, at, [&c.,] this — day of — A. D. —.

A. C., Clerk.

Per J. W., Deputy.

CERTIFICATE.—I do hereby certify that on the — day of — A. D. —, I joined in matrimony the within named A. B. and C. D.

To an Auctioneer.

This day came into court A. B. of — in said county, and presented his petition to be appointed and licensed to exercise the trade or occupation of auctioneer in said county of —; and on hearing, it is ordered by the Court, that a license for that purpose be issued to the said A. B. on his giving bond, agreeably to the statute, in the sum of one thousand dollars, with C. D. and E. F. as sureties, and paying into the treasury of said county a duty of — dollars.

Licenses.

Form of License.

The State of Ohio, — County, ss.

[SEAL.]

In pursuance of an order of the Court of Common Pleas of the county of —, at the — term thereof, A. D. —, license is granted to A. B. to sell goods, wares and merchandize, at public vendue, within the said county of —, for the term of one year from the — day of — A. D. —.

In testimony whereof, [&c.]

To Tavern Keeper.

On motion, it is ordered, that M. F. be licensed to keep tavern, at his house in — for the term of one year, on his paying into the county treasury the sum of — dollars.

Tavern License Refused.

On hearing the application of A. B., for a tavern license, the Court refuse the same: Whereupon it is ordered, that the said A. B. pay the costs of this application, in — days, or that execution issue therefor.

To Attorney and Solicitor on Admission to the Bar.

This day J. S., an applicant for admission to the bar, appeared in open Court; and it being shown to the satisfaction of the Court, that the said J. S. is of good moral character, and in all other respects qualified, according to the statute in such case made and provided; and the said J. S. being thereupon sworn to support the constitution of the United States and of the state of Ohio, and in all things to demean himself faithfully and honestly as an attorney and counsellor at law, and solicitor in chancery: It is ordered, that the said J. S. be admitted to practice as an attorney and counsellor at law, and solicitor in chancery, in the several Courts of the State of Ohio.

Form of Certificate.

To all whom it may concern:

These presents shall certify, that at a term of the Supreme Court of the State of Ohio, began and held at —, in the county of —, in the year of our Lord —, J. S., an applicant for admission to the bar, appeared in open Court; and it being shown to the satisfaction of said Court, that the said J. S. was of good moral character, and in all other respects qualified, according to

Naturalization, &c., of Aliens.

the statute in such case made and provided ; and the said J. S. being thereupon sworn to support the constitution of the United States and of the state of Ohio, and in all things to demean himself faithfully and honestly as an attorney and counsellor at law, and solicitor in chancery : It was thereupon ordered, that said J. S. be admitted to practice as an attorney and counsellor at law, and solicitor in chancery, in the several Courts of the State of Ohio.

In testimony whereof, [&c.]

SEC. X. NATURALIZATION OF ALIENS.

1. *Alien's Declaration.*

J. C., an alien and native of —, a free white person, this day came into open court, [or, before me, A. C., clerk of the Supreme, Superior, District or Circuit Court of a State, or, of a Circuit, or, District Court of the United States,] and declared, on his solemn oath, that he first arrived in the United States in the month of —, A. D. —, and that it is his *bona fide* intention to become a citizen of the United States, and to renounce, forever, all allegiance and fidelity to every Foreign Prince, Potentate, State or Sovereignty whatsoever, and particularly to —, King of —, [*the Prince, Potentate, State or Sovereignty, of which the alien is a citizen or subject.*]

Affidavit of Alien's Intention.

The State of Ohio, — County, ss.

I, A. C., an alien and native of —, being duly sworn, depose and say that I first arrived in the United States in the month of —, A. D. —, and that it is *bona fide* my intention to become a citizen of the United States, and to renounce, forever, all allegiance and fidelity to every foreign Prince, Potentate, State and Sovereignty whatsoever, and particularly all allegiance and fidelity to —, King of —, whose subject I am.

Sworn to and subscribed before me, this — day of —, A. D. —.

Clerk's Certificate thereto.

The State of Ohio, — County, ss.

Be it remembered, that on the — day of —, A. D. —, J. C., an alien and native of —, personally appeared before me, A. C., clerk of the [Supreme Court,] in and for said county, and declared on his solemn oath, that he first arrived in the United States in the month of —, A. D. —, and that it is his *bona fide* intention to become a citizen of the United States, and to renounce, forever, all allegiance and fidelity to every foreign Prince, Potentate,

Naturalization, &c., of Aliens.

State or Sovereignty whatsoever, and particularly to —, King of —, and subscribed his name to said declaration, which remains on file in my office.

In testimony whereof, I have hereunto set my hand officially, and affixed the seal of said court, at the city of —, this — day of —, A. D. —.

A. C., Clerk.

Grant of Certificate of Naturalization.

J. C., an alien and native of —, a free white person, this day came into court and proved to the satisfaction of the court, that he made in this court, two years ago, [*or*, in the Court of Common Pleas of — County,] the requisite declaration of his intention to become a citizen of the United States, that he has resided in the United States for five years last past, that he has resided one year last past in the State of Ohio, and that during all that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. And thereupon the said J. C., in open court here made solemn oath, that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign Prince, Potentate, State or Sovereignty, and particularly all allegiance and fidelity to —, King of —, whose subject he was. Whereupon, it is ordered by the court, that a certificate of naturalization be issued to him on payment of the costs of this application.

Certificate of Naturalization.

The United States of America,

To all to whom these Presents shall come, Greeting :

Whereas, at a term of the Court of Common Pleas, begun and held at —, on —, within and for the county of —, and State of Ohio, J. C., an alien and native of —, and a subject of the King of —, personally came before the Judges of the said Court of Common Pleas, and made application to be naturalized, under the laws of the United States; and it appearing, by sufficient testimony, to the satisfaction of said Court, that he, the said J. C., had made declaration of his intention to become a citizen of the United States, in due form of law, at least two years before making his said application; that he had been a resident of the United States for at least five years then last past, and of the said State of Ohio for at least one year then last past; and also that during that time, he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; whereupon, by order of the said court, an oath of allegiance was administered in due form of law, to the said J. C., in open court, that he will support the constitution of the United States, and that he absolutely and entirely renounced and abjured all allegiance and

Insolvent Debtors.

fidelity to every foreign Prince, Potentate, State or Sovereignty, whatsoever, and particularly to —, King of —, whose subject he was; And thereupon, It was ordered by the said court, that a certificate of naturalization be granted to the said J. C., according to the form of the statute of the United States in such case made and provided: which by these Presents is done accordingly.

Therefore the said J. C. is a citizen of the United States.

In testimony whereof, I, A. C., clerk of —, do hereby subscribe
[SEAL.] my name, and affix the seal of said court, at —, this — day
of —, in the year of our Lord —, and of the Independence
of the United States the —.

A. C., Clerk.

Grant of Certificate of Naturalization where the Alien arrived in the United States under eighteen years of age.

J. C., an alien and native of —, a free white person, this day came into open court and made the declaration and proof required, by the laws of the United States, of aliens who have resided in these States three years next preceding their arrival at the age of twenty-one years, for the purpose of obtaining the benefit of the laws of the United States, relating to naturalization: And thereupon the said J. C., in open court here, made solemn oath, [*&c.*, conclude as in the grant of a certificate of naturalization, ante, 1275.

SEC. XI. INSOLVENT DEBTORS.

Grant of Certificate to Insolvent on Default.

In the matter of T. B., an Insolvent Debtor.

This day came the said T. B., by Mr. O., his attorney, and the creditors of the said T. B. being three times solemnly called, came not, but made default: Therefore it is ordered, that a final certificate be granted to the said A. B., protecting him from arrest and imprisonment, upon the debts in his said schedule set forth, pursuant to the statute in such case made and provided.

Ordered, that said certificate be stayed till payment of the costs herein, taxed against the said T. B. to — dollars, [or that said T. B. pay the costs against him, amounting in the whole to — dollars, in sixty days, or that execution issue therefor.]

Cases of Bastardy.

The like on Hearing.

In the matter of T. B., an Insolvent Debtor.

This day came the said T. B., by Mr. O., his attorney, and also J. S., [&c.,] creditors of the said T. B., and the testimony of the witnesses being heard, and due deliberation thereupon had, the Court are of the opinion that the application of the said T. B. ought to be granted: Therefore it is ordered, that a final certificate be granted to the said T. B., discharging him from arrest and imprisonment, upon the debts in his said schedule set forth, pursuant to the statute in such case made and provided; and that the said creditors of the said T. B. pay their own costs herein, taxed to — dollars, in — days, or that execution issue therefor.

Ordered, that said certificate be stayed till payment of the costs herein taxed against the said T. B., [&c.]

SEC. XII. JOURNAL ENTRY IN CASES OF BASTARDY.^b

This day came the plaintiff, by his attorney, and also came the defendant, and to said complaint plead not guilty; and thereupon to try the issue, came a jury, to wit: E. F., [&c.,] who being empaneled and sworn the truth to speak upon the said issue, upon their oaths do say, that the defendant is guilty in the premises. It is therefore considered and adjudged by the Court, that the defendant is the putative father of said child, and stand charged with the maintainance thereof as follows: the defendant shall pay to the said A. B., [*the mother,*] to be by her expended in the support, maintainance and education of said child, the sum of — hundred dollars, in installments as follows: [&c.] And it is further considered, that the defendant pay the costs of this prosecution, taxed to — dollars, within thirty days. And, to secure the payment of said sums of money and costs, it is ordered, that said defendant forthwith execute a *bond* to said A. B., with [two] sufficient sureties, to be approved of by the Court, in the sum of — dollars, conditioned to perform the order of the Court herein [and thereupon the said A. B., with E. F. and G. H., his sureties, approved by the Court, executed said bond, &c.; or say, and thereupon the defendant refusing to enter into said bonds with sureties, it is ordered, that the defendant be, and he was thereupon committed to the jail of the county, there to remain till he shall comply with the above order, or be otherwise lawfully discharged.]

(b) Swan's Stat. 157, sec. 5. 6.

 Redemption of Land sold for Taxes.

*Order for Redemption of Land sold for Taxes.**

A. B. et al., }
 v. }
 O. P. } Application to redeem from Tax Sale.

This day came the parties by their attorneys, and this application coming on to be heard upon the petition, answers, testimony and exhibits, and the premises being seen and fully understood, the Court do find the allegations in the petition to be true, and that the petitioners have good right to redeem the lands in the petition described, from the said sale for taxes, and to have restitution of the same : Therefore it is ordered, that the said O. P. surrender the said lands in the petition described to the said petitioners, or to such person or persons as they shall direct, free and clear of any and all claim or incumbrance whatsoever, by reason of the said sale for taxes, in the said petition mentioned ; and that said petitioners have restitution of the same, according to the statute in such case made and provided : And it is further ordered, that the said O. P. pay the costs of this application, taxed to — dollars, in sixty days, or that execution issue therefor.

Order to Sheriff for Valuation of Improvements of Land Sold for Taxes.

[SEAL.] The State of Ohio,

To the Sheriff of — County, Greeting :

Whereas lately in our Court of Common Pleas, within and for the county of —, A. B., [&c.,] by an order of the same Court, redeemed from a certain sale for taxes, a tract or parcel of land, situate in said county of — and bounded and described as follows, to wit : [*Describe the land as in the petition.*] And whereas upon the making of the said order of redemption, our said Court of Common Pleas, on the application of O. P. in that behalf, granted to the said O. P. the benefit of the statute for the relief of occupying claimants : Therefore we command you, that without delay, by the oaths of E. F., [*naming the jurors*] and upon actual view of the premises, you cause to be made a just and true assessment of the value of all lasting and valuable improvements made upon the tract or parcel of land aforesaid, by the said O. P., since the — day of — A. D. —, [*two years from the day of sale ;*] and also that, in like manner, you cause to be made a just and true assessment of the damages, if any, which the said tract or parcel of land may have sustained by waste, together with the net annual value of the rents and profits which the said O. P. may have received from the same, from and after the — day of — A. D. —, [*day of sale.*] deducting the amount of such rents and profits from the estimated value of the lasting and valuable improvements aforesaid ; And of this writ make legal service and due return.

Witness F. C., Clerk of our said Court of Common Pleas at —, this — day of — A. D. —.

F. C., Clerk.

CHAPTER XLVIII.

- SECTION**
- I. ACTIONS BY THE GRANTEE OF THE REVERSION.**
 - II. PROCESS IN LOCAL ACTIONS.**
 - III. ACTIONS BY AND AGAINST PARTNERS, &c.**
 - IV. ACTIONS ON CONTRACTS OF SALE.**
 - V. PLEA OF THE STATUTE OF LIMITATION.**
 - VI. ORAL ARGUMENTS AND BRIEFS IN BANK.**

There have been some modifications of the law, by statute and decision since the first volume of this work was published, which will be here noticed.

SEC. I. ACTIONS BY THE GRANTEE OF THE REVERSION.

In the case of *Crawford against Chapman*,^a it was held, that the English statute, heretofore referred to,^b has not incorporated itself into the laws of this State; and consequently, that the grantee of the reversion cannot maintain an action of covenant, in his own name, against a lessee, upon an express covenant contained in the lease, for the payment of money.

SEC. II. PROCESS IN LOCAL ACTIONS.

In a civil action, which can only be brought within some particular county, if the defendant or defendants reside in any other county than the county in which such action is authorized to be brought, any process necessary for the commencement or prosecution of such suit, against such defendant or defendants, may issue to any county where any such defendant or defendants may reside; which process must be served and returned, as is provided for in other cases, where process is authorized to be issued to another county.^c

(a) 17 O. R. 449. (b) Stat. 32, Hen. 8, chap. 34, seq ante, page 48, 49. (c) 46 vol. Stat. 32,

Actions by and against Partners — On Contracts of Sale.

SEC. III. ACTIONS BY AND AGAINST PARTNERS.

Any company or association of persons, formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property within the State of Ohio, and not incorporated as such, may sue or be sued in any of the courts of this State, by such usual or ordinary name as such company, partnership or association, may have assumed to itself, or be known by ; and it is not necessary in such case, to set forth, in the process and pleadings, or to prove at the trial, the names of the persons composing such company. The process in such case is served upon the company or firm by a copy left at their usual place of doing business within the county ; and executions issued on any judgment, rendered in such proceedings, operates on the partnership property only. The individual property of the partners can be reached by a bill in Chancery. Where a company so sues, the writ must be indorsed with security for costs, or, security must be given for costs, in other sufficient form.^d

The commencement of the declaration in such case may be in the form following :

Court of Common Pleas, — County. Of the term of — , A. D. — .

The State of Ohio, — County, ss.

"Wilson, Bradley, & Co." [*the name of the firm.*] (a company of persons formed for the purpose of carrying on the business of [merchants,] not incorporated, and "Wilson, Bradley, & Co." being the usual name by which said company is known,) by J. S., their attorney, complain of "Frog, Mason, & Co.," (an association of persons formed for the purpose of holding [goods and chattels or real estate] within the State of Ohio, not incorporated, and "Frog, Mason, & Co." being the usual name by which said association is known,) in a plea of [assumpsit ;] for that whereas, [&c.]

SEC. IV. ACTIONS ON CONTRACTS OF SALE.

In the case of *Witherow against Witherow*,^e where a quantity of corn was to be delivered within a specified period, and payment to be made for the same on a day certain after delivery, and a part was delivered and accepted, but not the whole, within the time specified, it was held that no recovery could be had for the part delivered.^f

(d) 44 vol. Stat. 66.

(e) 16 Ohio Rep. 238.

(f) Ante, p. 206, 207.

Plea of Statute of Limitations—Oral Arguments and Briefs in Bank.

SEC. V. PLEA OF THE STATUTE OF LIMITATIONS.

In the case of Newsom's Administrator against Ran,^g where the question arose as to filing a plea of the statute of limitations, the Court say :

"This is not a plea to the merits, and consequently is not ordinarily received after the rule day. See *Sheets vs. Baldwin's Administrators*, 12 Ohio Rep. 120, and numerous authorities therein cited.

"The court say, in that case, that 'the authorities show a concurrent course of decisions, in the English and American courts, that after the expiration of the rule day, or when the issue is closed, or a party is in default, the plea of the statute of limitations ought not to be permitted; that it is a strict legal defence, and which a party may, and must, at his peril, see that he pleads in time, or its benefits to him are lost.'

"We are unable to take any distinction, in principle, between the administrator's bar of four years, and the general limitation of actions.

"Extraordinary circumstances will often demand a relaxation of the rule in both cases, and perhaps oftener in the case of executors and administrators than in any other.

"The whole matter rests in the sound discretion of the court in which the pleas are to be entered, and we have no fear that this discretion will be abused."

SEC. VI. ORAL ARGUMENTS AND BRIEFS, ETC., IN BANK.

Since the first volume of this work was published, oral arguments are required by law to be made in Bank. The attorney or solicitor, however, of either party, being at liberty, if he choose, to present a written or printed argument.^h

By rule of court since made, and adopted January 6, 1846,ⁱ it is provided, that in all cases to be argued at bar in open court, it shall be the duty of the party holding the affirmative, to furnish each member of the court with a full abstract of the case, with a brief of the points made and authorities relied upon; and it shall be the duty of the opposite counsel, in like manner, to furnish each member of the court with a similar brief of the points made, and authorities relied upon, in defence; and which said abstracts and briefs shall be legibly written or printed, and furnished at least one day before the case is called up for argument.

By order of the court, adopted January 15, 1848,^j before any case can be docketed, the fees of the clerk of the Court in Bank, (three dollars,) must be paid to him by the party holding the affirmative, or presenting the record or files. This fee is taxed in the bill of costs.

(g) 18 Ohio Rep. 246.

(h) 43 vol. Stat. 81, sec. 8.

(i) OrderBook, p. 69.

(j) Order Book, p. 220.

☞ Some typographical errors have occurred, (such as darrien for darrein, debit for debet, &c.,) which the reader can readily correct. It is stated on page 383, that the statutes of Ohio do not seem to contemplate an action of debt upon the recognizance of special bail. This the reader will perceive by a reference to the statute, (Swan's Stat. 656,) is a mistake. The 18th volume of the Ohio Reports and this volume, were printed at the same time, and a few only of the reported cases in that volume are cited.

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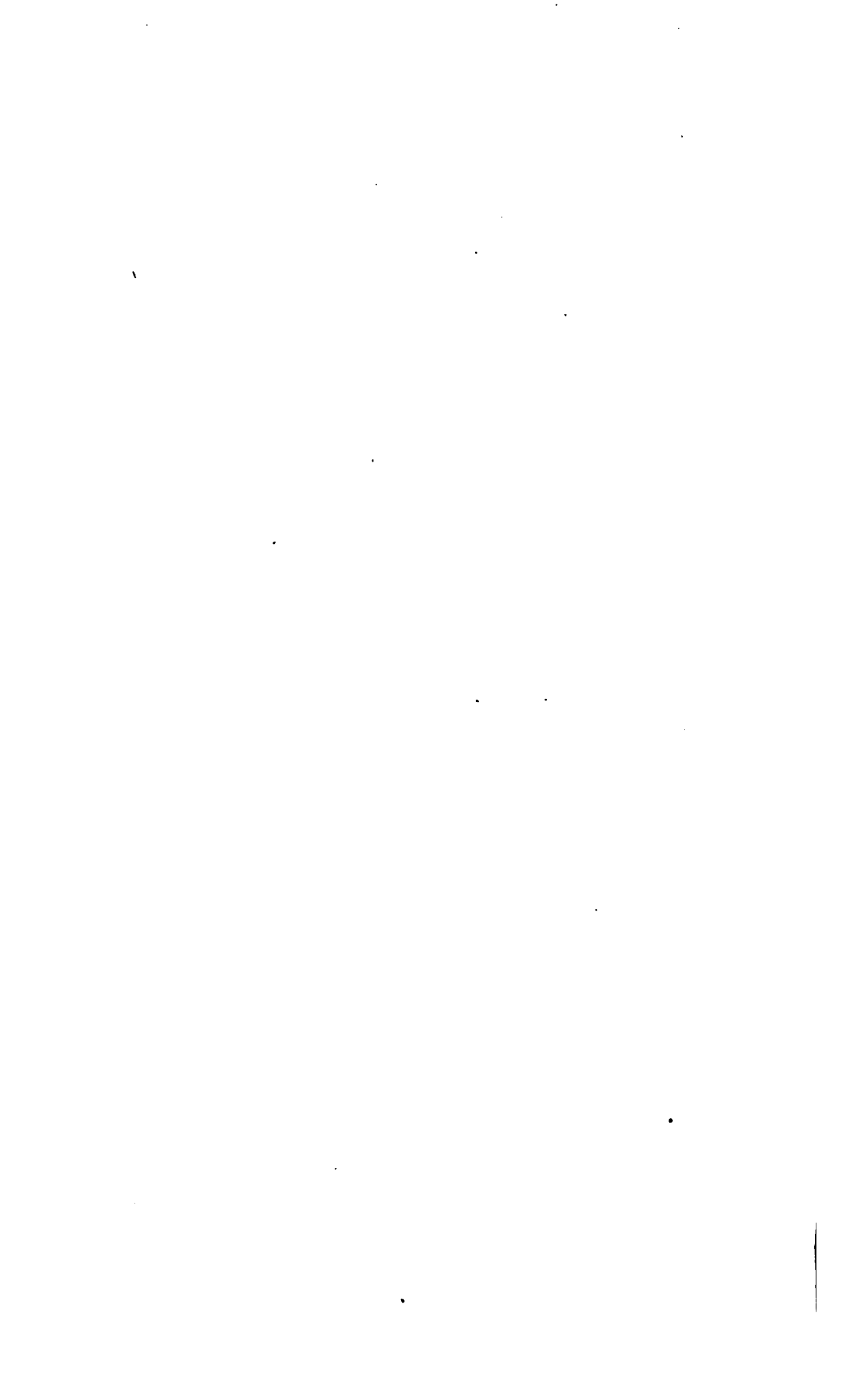
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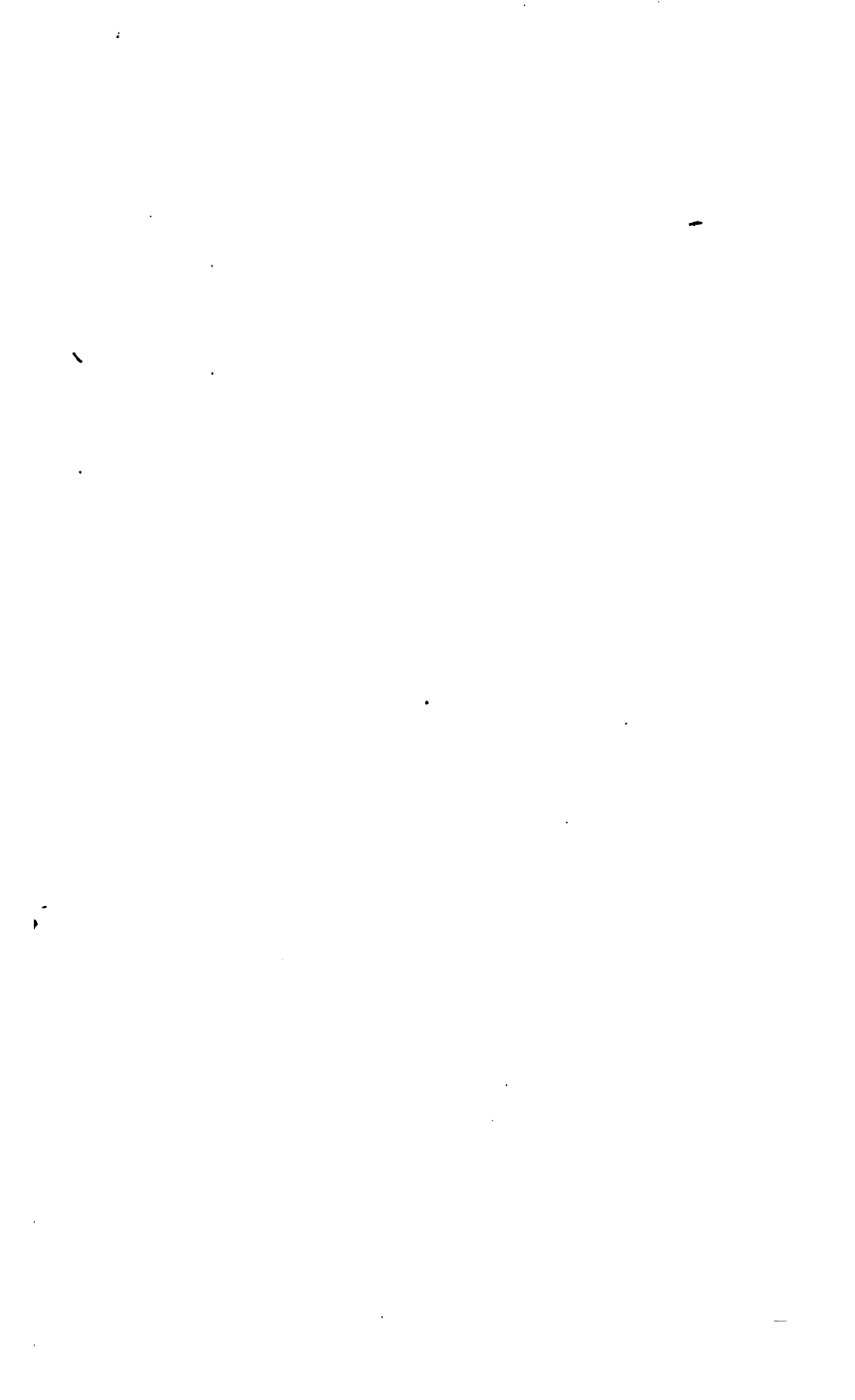
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